Supreme Court, U.S.
FILED

951913 MAY 23 1996

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No. _____

In The

Supreme Court of the United States

October Term, 1995

THIOKOL CORPORATION, et al.,

Petitioners,

vs.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN; DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan; and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

PATRICK R. VAN TIFLIN
Counsel of Record
MICHELE L. HALLORAN
KIM D. CROOKS
HOWARD & HOWARD ATTORNEYS, P.C.
The Phoenix Building, Suite 500
222 Washington Square, North
Lansing, Michigan 48933-1817
(517) 485-1483

May 23, 1996

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

146pp

QUESTIONS PRESENTED

I. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit which allows the State of Michigan to impose a state tax obligation on employers measured by reference to the amount of the employer's payments for health and life insurance acquired for its employees and contributions made to retirement plans established for the benefit of its employees which are subject to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") despite the ERISA preemption clause prohibition against the enactment of "any state tax law relating to employee benefit plans" covered by ERISA?

II. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit that a 90 day statute of limitations limiting the right of a Michigan taxpayer to contest a Michigan tax on the basis that the tax violates a federal statute such as ERISA or a constitutional provision, when a four-year statute of limitations applies to the right to contest the tax on any other basis, is not preempted by ERISA?

III. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit that a federal court lacks jurisdiction to consider a declaratory judgment action requesting as relief a determination that a 90 day statute of limitations on the right of a Michigan taxpayer to contest a Michigan tax on the basis that the tax violates a federal statute such as ERISA or a constitutional provision, violates the due process and/or equal protection clauses of the United States Constitution, in light of 28 U.S.C. § 1341?

DISCLOSURE OF CORPORATE AFFILIATIONS OF PETITIONERS

Pursuant to Supreme Court Rule 29.6, Petitioners make the following disclosure:

1. The following Petitioners are not subsidiaries or affiliates of a publicly-owned corporation:

   Coca-Cola Company
   Jefferson Smurfit Corporation
   Kroger Co.
   M-I Drilling Fluids Company
   May Department Stores Company
   Quaker Chemical Corporation
   Sears Roebuck and Co.
   Thiokol Corporation
   Timken Company
   Upjohn Company
   W.R. Grace & Co.-Conn.

2. Listed below is the identity of the parent corporation or affiliate of any Petitioner and the relationship between it and the named Petitioner:

   A) Akzo Nobel N.V. (parent)
   Akzo America Inc. (subsidiary)
   Akzo Chemical Inc. (subsidiary)
   Akzo Coatings Inc. (subsidiary)
   Akzo Salt Inc. (subsidiary)

   B) Bayer A.G. (parent)
   Bayer Corporation (subsidiary)
   (formerly Miles Inc.)

   C) Harnischfeger Industries (parent)
   Beloit Corporation (subsidiary)
   Harnischfeger Corporation (subsidiary)

DISCLOSURE OF CORPORATE AFFILIATIONS OF PETITIONERS – Continued

D) Morton International, Inc. (parent)
Bee Chemical Company (subsidiary)

E) SmithKline Beecham PLC (parent)
SmithKline Beecham Corporation (subsidiary)
(formerly Beecham, Inc. (TN))

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PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioners, Thiokol Corporation, *et al.* and Akzo America Inc., *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on February 23, 1996 in this matter.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 76 F.3d 751 (6th Cir. 1996) (App. 1) and was filed on February 23, 1996. The District Court opinion in *Thiokol, et al.* is reported at 858 F. Supp. 674 (W.D. Mich. 1994) (App. 40) and was decided on July 22, 1994. The District Court opinion in *Akzo America Inc., et al.* is reported at 1995 U.S. Dist. LEXIS 1784 (W.D. Mich. January 13, 1995) (App. 29). All three opinions are set forth in the attached Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1996, and this petition is filed within 90 days thereof. This Court's jurisdiction to consider this petition from the judgment or decree of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The following are the provisions which are involved in this case: U.S. Const. Art. I, § 8, cl. 3 and Art. VI, cl. 2; 28 U.S.C. §§ 1341, 2201; 29 U.S.C. §§ 1132, 1144; and Mich.Comp.Laws Ann. §§ 205.27a (West 1986 & Supp. 1995), 208.4, 208.9, 208.31. The relevant portions involved are printed in the Appendix.

STATEMENT OF THE CASE

Petitioners invoked the federal question and declaratory jurisdiction of the District Courts below under 28 U.S.C. §§ 1331 and 2201 and 29 U.S.C. § 1132(e)(1) (App. 68). Petitioners allege that Michigan's Single Business Tax Act (SBTA), 1975 P.A. 228, as amended, Mich.Comp.Laws Ann. § 208.1, *et seq.* (West 1986 & Supp. 1995), violates § 514(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a). All Petitioners transact business in Michigan and in other states. Each Petitioner sponsors, administers and participates in "employee benefit plans" that provide benefits to substantially all of their employees in Michigan and elsewhere. These plans are "employee benefit plans" within the meaning of § 3(3) of ERISA, 29 U.S.C. § 1002(3). Each Petitioner is a fiduciary within the meaning of 29 U.S.C. § 1002(21) and § 1132(a)(3). The preemption clause, 29 U.S.C. § 1144 (App. 69), supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . . " including "any state tax law".

The SBTA expressly includes employer contributions to employee benefit plans in the computation of single business tax ("SBT"), Mich.Comp.Laws Ann. § 208.4(3) and (9) (West 1986) (App. 76). Respondents administer the SBTA. Petitioners have filed SBT returns, and have paid SBT to Michigan. One component of SBT base is compensation, which includes payments to pension, retirement, or profit sharing plans and payments for health and life insurance and payments of fees for administration (hereinafter "plan contributions").

Petitioners deducted the insurance premiums and administrative fees under § 162 (26 U.S.C. § 162) of the Internal Revenue Code of 1986 ("the Code"). Contributions to qualified employee benefit plans were deducted under § 404 (26 U.S.C. § 404) of the Code. The SBTA reverses these deductions.

On November 12, 1993, the parties took the deposition of John C. Hedley, Vice President of Human Resources for Petitioner Morton International. Mr. Hedley indicated that

there was a clear relationship between the state tax burden imposed on Morton by the SBTA and the level of employee benefits offered by the company. He said the state tax burden was important to Morton in determining what the company would offer its employees in the way of current and future benefits (App. 86) and that, in response to state taxes, the level of benefits could be changed (App. 88). Most significantly, Mr. Hedley testified that the SBTA had a multistate impact on the level of benefits provided for employees located outside of the state of Michigan, saying that a tax by Michigan on employee benefit costs has a disproportionate effect on what the company can provide by way of benefits for employees located in the state of Utah. (App. 104)

REASONS FOR GRANTING THE WRIT

The decision of the Sixth Circuit Court of Appeals conflicts with relevant decisions of this Court and erodes the ERISA preemption clause. The decision endorses state action which exerts pressure on an employer to choose between the payment of a state tax and reducing or eliminating the benefits for its employees. It permits Michigan to impose a state tax payment obligation, measured in part by reference to the employer's plan contributions, forcing the employer to, in essence, pay the state for the privilege of sponsoring employee benefit plans. It is the first decision anywhere in the nation which has upheld the exercise of state taxing power exerted in reference to plan contributions. The Congress has clearly expressed its preemptive intent with regard to state taxation which relates to employee benefit plans. The decision below runs counter to that declaration of congressional intent and threatens the lifeblood of employee benefit plans, the employer contributions which fund the plan. Unless reviewed and reversed by this Court, the decision below will be a clarion call to every state and local taxing jurisdiction in the nation to descend upon employers with tax levies designed to capitalize upon an employer's plan contributions which the Congress has encouraged and has carefully preserved from taxation under the federal tax system. A state tax

on plan contributions runs counter to the federal incentive to establish and fund such plans contained in the Internal Revenue Code and interferes with the Congressional findings and declaration of policy relating to labor law, interstate commerce and taxation expressed in the purpose clause of ERISA. 29 U.S.C. § 1001. The national scope of ERISA, a labor law of major significance to the national economy, makes this case a compelling matter for review by this Court.

The SBTA imposes a privilege tax of 2.35 percent on the adjusted tax base of every person with business activity in Michigan which is allocated or apportioned to Michigan. Mich.Comp.Laws Ann. § 208.31 (West 1986 & Supp. 1995) (App. 78). Mich.Comp.Laws Ann. § 208.9 (West Supp. 1995) (App. 77) defines "tax base" as "business income, before apportionment or allocation as provided in chapter 3 [of the SBTA]" subject to a number of adjustments prescribed by § 9. One of the § 9 add-back adjustments is "compensation as defined in [SBTA] section 4." In turn, § 4(3) of the SBTA, Mich.Comp.Laws Ann. § 208.4(3) (West 1986) (App. 76), defines "compensation" in all-inclusive fashion to mean:

> all wages, salaries, fees, . . . **payments to a pension, retirement, or profit sharing plan, and payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans and payments of fees for administration of health and welfare and noninsured benefit plans.** (emphasis supplied)[1]

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[1] The version of § 4(3) included in the Appendix was amended by 1995 Public Act No. 285. It eliminated from "compensation" payments to state and federal unemployment compensation funds, the employer's portion of payments under the Federal Insurance Contribution Act, the Railroad Retirement Act, similar social insurance programs and payments including self insurance payments for worker's compensation insurance or federal employer's liability act insurance. 1995 P.A. 285 was given immediate effect on January 9, 1996 and is effective January 1, 1995. The current definition of compensation is even less comprehensive as a measure of labor cost than it was before.

The SBT annual return form C-8000 reproduced in the Appendix (App. 79) implements the provisions of SBTA § 4(3) by providing a section headed "compensation" consisting of lines 13 through 15 on which each of the components of SBT compensation is to be reported. Payments for insurance for which employees are the beneficiaries, including payments under health and welfare and non-insured benefit plans and payment of fees for the administration of health and welfare and non-insured benefit plans are to be reported on line 13 and included in compensation. Payments to a pension, retirement or profit sharing plan are to be reported on line 14 and included in compensation. Once compensation is calculated, other additions and subtractions are made to reach a tax base calculated on line 32. If the taxpayer is taxable in more than one state, it apportions the tax base by means of a formula, adjusts apportioned tax base for capital acquisitions and any business loss and may reduce the apportioned tax base through calculation of an "excess compensation reduction."[2]

The tax cannot be determined without making specific reference to plan contributions and payments. The state law tax liability is imposed by a specific reference to plan contributions in § 4(3) of the SBTA. The SBT return specifically identifies and mandates inclusion of these plan contributions in SBT base. The inclusion of plan contributions in SBT base requires taxpayers, revenue collectors and any reviewing

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[2] The excess compensation reduction is explained in a January 1985 report by the Taxation and Economic Policy Office of the Michigan Department of Treasury. Parts of the Report are in the Appendix (App. 117), including a discussion of the manner in which the excess compensation reduction is calculated. This discussion is particularly meaningful in the context of Respondents' assertion that the SBTA does not tax contributions to ERISA plans. The excess compensation reduction is calculated *after* the tax base is calculated and apportioned. See line 43 of the return Form C-8000 in the Appendix (App. 79). This graphicaliy illustrates the deception within Respondent's contention that the tax base, once assembled by amalgamating its various components, is not susceptible of evaluation for compliance with ERISA's preemption clause.

court to refer to the plan contributions in determining whether a taxpayer has fulfilled the taxpaying requirements imposed on it by the SBTA. Respondents acknowledge that application of the SBTA so as to require each Petitioner to include in the SBT base its contributions to and the cost which it incurs in sponsoring and providing employee benefit plans has and will have the effect of increasing each Petitioner's SBT liability.

Moreover, the decision below wrongly applied the Tax Injunction Act, 28 U.S.C. § 1341, case law and prevailing principles in determining that the district court in *Akzo* lacked jurisdiction to decide whether the short 90 day limitations period applicable to refund claims brought by a taxpayer based on the Michigan constitution or the constitution or laws of the United States violates federal equal protection or due process guarantees. The jurisdictional vagaries invoked by the Sixth Circuit's decision have a wide-ranging impact upon litigants who, in conjunction with claims they assert which are well within the district court's jurisdiction, seek to have that court decide related and closely intertwined questions squarely within its realm of expertise, and thus is a matter of considerable public importance. In addition, the question of whether a limitations period, found within the taxing authority's administrative provisions, relates to the "assessment, levy or collection of a tax" within the meaning of the Tax Injunction Act is a significant question which has not been previously addressed by this Court (or any lower federal court). Thus, resolution of the question by this Court will enhance the body of jurisprudence relating to the scope of the Tax Injunction Act.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT THE PREEMPTION CLAUSE OF ERISA, 29 U.S.C. § 1144(a), DOES NOT PREEMPT § 4(3) OF THE MICHIGAN SINGLE BUSINESS TAX ACT WHICH SUBJECTS TO TAXATION CONTRIBUTIONS MADE BY A TAXPAYER TO BENEFIT PLANS SUBJECT TO ERISA.

A. THE LAW OF ERISA PREEMPTION

Section 514(a) of ERISA, 29 U.S.C. § 1144(a) preempts "any and all state laws in so far as they may now or hereafter relate to any employee benefit plan." State tax laws are specifically preempted. 29 U.S.C. § 1144(b)(5)(B)(i). The actuating term in § 514(a), "relate to", has been the subject of scrupulous attention by the federal courts. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983) this court said, "a law 'relates to' an employee benefit plan, in the normal sense, if it has a ***connection with*** or a ***reference to*** such a plan" (emphasis supplied). ERISA preemption analysis involves a determination as to whether the state law drawn into question has *either* a connection with or a reference to an employee benefit plan to which ERISA is applicable. It is not necessary that the state statute be shown to have *both* a connection with and a reference to an employee benefit plan. Either will suffice to support a finding of preemption. Most frequently, a state law which has a reference to a covered employee benefit plan will also be found to have a connection with the plan. However, state statutes of general applicability that contain no reference to a plan have nonetheless been found to have a connection with a covered plan.[3]

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[3] In *Shaw*, the New York statutes under scrutiny were the Human Rights Law and the Disability Benefits Law. Neither statute contained a specific reference to employee benefit plans. Acknowledging that neither

In *The District of Columbia and Sharon Pratt Kelly, Mayor v. Greater Washington Board of Trade*, 506 U.S. 125, 121 L.Ed.2d 513, 113 S.Ct. 580 (1992), the court considered a District of Columbia enactment that required an employer who provides health insurance coverage for its employees to provide equivalent coverage for employees receiving or eligible to receive worker compensation benefits. In testing whether the provision "related to" a covered employee benefit plan, this Court said: "**Section 2(c)(2) of the District's Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted.**" *Id. at* 121 L.Ed.2d 520. The health insurance coverage which the District of Columbia law required employers to provide was *measured by reference* to the existing insurance coverage provided by the employer, a welfare benefit plan covered by ERISA. The Court said that any state law imposing requirements by reference to such covered programs must yield to ERISA. *Id.* at 121 L.Ed.2d 521. Like the District of Columbia law, the SBTA imposes a state tax requirement by reference to employer plan contributions. The 1988 decision in *Mackey v. Lanier Collection Agency and Service, Inc.*, 486 U.S. 825, 100 L.Ed.2d 836, 108 S.Ct. 2182 (1988) also involved a statute that contained a specific reference to an ERISA covered plan. The Court found preemption of a Georgia law that specifically referred to ERISA plans in exempting them from garnishment. The Court said state laws which make 'reference to' ERISA plans are laws that 'relate to' those plans within the meaning of Section 514(a)," concluding that "[t]he state statute's express reference to ERISA plans suffices to bring it within the federal law's preemptive reach." *Mackey*, 100 L.Ed.2d at 843, 844. The 1990 decision in *FMC Corp. v. Holliday*, 498 U.S. 52, 112 L.Ed.2d 356, 111 S.Ct. 403 (1990), dealt separately with the ***reference to*** and

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law evidenced a frustration of congressional intent (*Shaw*, 77 L.Ed.2d at 501, n.15), the Court rejected arguments that the ERISA preemption clause was intended to preempt only state laws specifically designed to affect employee benefit plans or state laws dealing with subject matters covered by ERISA. *Shaw*, 77 L.Ed.2d at 501.

connection with analysis for finding that the state statute "relates to" a covered benefit plan (the Court found that the insurance saving clause excepted the Pennsylvania statute from the operation of the preemption provision).[4]

By its holdings in *Mackey*, *FMC* and *Greater Washington*, the Court has made it abundantly clear that a specific reference to employee benefit plans regulated by ERISA, contained in a state statute imposing a requirement by reference to the ERISA covered plan, requires a finding of pre-emption.

In the proceedings below, Petitioners urged the consistent pattern of preemption analysis in *Mackey*, *FMC* and *Greater Washington* as supporting the conclusion reached by Federal District Judge Bell in *Akzo*. Yet, the Sixth Circuit opinion erroneously characterized the position of Petitioners to be that *Greater Washington* "restricted the *Shaw* exception" (*Thiokol*, 76 F.3d at 756), said "Thiokol and Akzo argue that by using the words 'on that basis alone' the Court was announcing a

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[4] "We made clear in *Shaw v. Delta Airlines*, *supra*, that a law relates to an employee welfare plan if it has a "connection with or reference to such a plan" [citation omitted]. We based our reading in part on the plain language of the statute. Congress used the words "relate to" in Section 514(a) (the preemption clause) in their broad sense." [citation omitted] It did not mean to preempt only state laws specifically designed to affect employee benefit plans. That interpretation would have made it unnecessary for Congress to enact ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4) [29 U.S.C.S. § 1144(b)(4)], which exempts from pre-emption 'generally' applicable criminal laws of a state. [material omitted]. We also emphasized that to interpret the preemption clause to apply only to state laws dealing with the subject matters covered by ERISA, such as reporting, disclosure, and fiduciary duties, would be incompatible with the provision's legislative history because the House and Senate versions of the bill that became ERISA contained limited preemption clauses, applicable only to state laws relating to specific subjects covered by ERISA. These were rejected in favor of the present language in the Act, 'indicate(ing) that the section's pre-emptive scope was as broad as its language [citing *Shaw*]. Pennsylvania's anti-subrogation law has a 'reference' to benefit plans governed by ERISA [material omitted]. The Pennsylvania statute also has a "connection" to ERISA benefit plans. *FMC*, 112 L.Ed.2d at 364.

new test" (*Id.* at 757), and inquired whether the Court in *Greater Washington* was, "as Thiokol and Akzo argue, announcing a new rule." *Id.* Quite to the contrary, the holdings in *Mackey*, *FMC* and *Greater Washington* demonstrate the Court has been consistent in applying the reference to and connection with alternatives of the relates to analysis and applying the remote, tenuous and peripheral qualifiers to the connection with branch of preemption analysis.

Last term, this Court reinforced the independence of the "connection with" and "reference to" branches of the *Shaw* standard in *New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Company, et al.*, ___ U.S. ___, 131 L.Ed.2d 695, 115 S.Ct. 1671 (1995). The Court explicitly recognized the alternative nature of the "connection with" and "reference to" tests in *Shaw*.[5] The Court reaffirmed the vitality of the "specific reference" analysis employed in *Greater Washington* and illuminated that ruling by identifying the "reference to" branch of the *Shaw* analysis as an *alternative* to the "connection with" branch of the analysis.

The absence of a "reference to" welfare benefit plans regulated by ERISA in the state law involved in *New York Blue Cross Plans* therefore left the Court "to question whether the surcharge laws have a 'connection with' the ERISA plans. . . . " *Id.* In finding the laws did not have a prohibited "connection with" the ERISA plans in question, the Court

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[5] In Shaw, we explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or a reference to such a plan." 463 US, at 97. The latter *alternative*, at least, can be ruled out. The surcharges are imposed upon patients and HMOs, regardless of whether the commercial coverage or membership, respectively, is ultimately secured by an ERISA plan, private purchase, or otherwise, with the consequence that the surcharge statutes cannot be said to make 'reference to' ERISA plans in any manner. Cf., *Greater Washington Board of Trade*, 506 US, at ___ (slip op., at 4) (striking down District of Columbia law that 'specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted')." [underline added] [*New York Blue Cross Plans*, 131 L.Ed.2d at 705]

observed that the New York surcharge laws have an indirect economic effect on choices made by insurance buyers, including, but not limited to, ERISA plans. *Id.* at 707. This indirect economic effect stands in stark contrast to the direct impact which the SBT has upon the employer as plan sponsor, since the tax requires a reference to, and is measured by, the contributions which the employer makes to the employee benefit plan. There is nothing indirect about imposing a state tax payment obligation by reference to the actual dollar amounts of plan contributions which fund the benefits the employer furnishes to its employees. Further, this Court in *New York Blue Cross Plans* observed, this indirect economic influence does not bind plan administrators to any particular choice for health insurance. *Id.* In contrast, single business taxpayers have *no choice*. A New York ERISA plan may choose among commercial insurers, (full surcharge) HMO's (partial) and Blue Cross (exempt) plans to acquire health insurance. The existence of this choice saved the New York surcharges from preemption because their indirect economic influence does not bind plan administrators to any particular choice. The single business taxpayer providing employee benefits has its SBT liability measured by the plan contributions. Unlike the New York-based ERISA plans, single business taxpayers have no alternative but to reduce or eliminate benefits. The Court recognized in *New York Blue Cross Plans* that even an indirect economic influence or effect could be found to have a sufficient and therefore prohibited connection with an ERISA plan. At page 710 of its opinion, the Court observed, "[T]here might be a point at which an exorbitant tax leaving consumers with a Hobson's choice would be treated as imposing a substantive mandate. . . . " The existence of choice within the New York health insurance market was critical. By contrast, the SBT provides a plan-sponsoring employer no choice with regard to inclusion of plan contributions in the tax base. The only choice the employer has is to scale back or terminate its employee plans altogether, truly a "Hobson's choice".

The Court observed that nothing in the language of ERISA or the context of its passage indicates that Congress chose to displace general health care regulation which historically has been a matter of local concern. 131 L.Ed.2d at 709. By contrast, the preemption clause of ERISA specifically bars "any state tax law relating to employee benefit plans." This Congressional mandate removing from states the power to enact state tax laws which "relate to" ERISA plans further distinguishes the SBT and its calculation of liability by reference to plan contributions. In upholding the New York surcharge, the Court observed that a contemporaneous enactment of the 93rd Congress which enacted ERISA had encouraged, and in fact provided funding for, states to experiment with health service systems and policies. 131 L.Ed.2d at 711. The Court found that the subject matter of the New York surcharge system was the same as that envisioned by the National Health Planning and Resources Development Act and concluded that preemption of the surcharge plan would be inconsistent with specific Congressional authorization for state legislation concerning that subject. By contrast, ERISA specifically prohibits state tax laws.

In *Greater Washington*, the Court not only expressly held that the District of Columbia act specifically refers to welfare benefit plans regulated by ERISA and, *on that basis alone*, is preempted, but explicitly stated in footnote 1 that "preemption does not occur if the state law has only a tenuous, remote or peripheral ***connection*** with covered plans," (citing *Shaw*, emphasis supplied) 121 L.Ed.2d at 520. Footnote 1 ties the tenuous, remote and peripheral test to the "connection" branch of the *Shaw* analysis and notes that it is frequently the case with laws of general applicability. However, laws of general applicability are those which do not contain a reference to a covered benefit plan and it is, therefore, their connection with the covered benefit plan which is scrutinized.

In seeking to trivialize the importance of the "reference to" language in the "relates to" test, the Sixth Circuit reasons that merely changing the words in the state tax statute can produce a non-preemptive result. *Thiokol*, 76 F.3d at 756. However, it is not "the ERISA word," as Respondents have

characterized it, that is prohibited. What is prohibited is a state statute which imposes a requirement or obligation measured by reference to an ERISA covered employee benefit plan. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), the Court was critical of its prior decisions which had determined the validity of state taxes based on the label which had been applied to the tax by the enacting state. The Court observed that a state tax on "the privilege of engaging in activity in a state" did not necessarily reveal factors critical to determining the validity of the tax. The Court instead made an evaluation of the practical effect of the method by which the tax was measured and determined. *Id.* at 51 L.Ed.2d 330-31. It is precisely so in this case. As this Court observed in *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 112 L.Ed.2d 884, 111 S.Ct. 818 (1991), "A tax on sleeping measured by the number of shoes you have in your closet is a tax on shoes." 112 L.Ed.2d at 905. Michigan may not escape a critical evaluation of its SBT by simply cloaking its statute under the label of "value added tax" or a "tax on the privilege of engaging in business activity." It must be answerable under an ERISA preemption analysis for its specific reference to employee benefit plan contributions and payments as providing a measure of the tax.[6]

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[6] Similarly, it is inapposite for the Sixth Circuit to find against preemption in this case by considering 432 other, unspecified state statutes, about which no one has complained, and not involved in this proceeding which the Court says *might* be subject to a determination of preemption. *Thiokol*, 76 F.3d at 760. There is only one statute involved in this case, which is but one subsection of one section of an otherwise valid and enforceable state tax law. It is highly prejudicial, illogical and inappropriate for the Court below to decide the merits of this case by reference to other state statutes which have not been challenged by the Petitioners in this case.

B. THE SIXTH CIRCUIT LAW OF ERISA PREEMPTION

As crafted by the Sixth Circuit, the preemption standard which it characterizes as the "*Shaw* standard" actually establishes two three-part inquiries.[7] It is open to question why the Sixth Circuit would feel it necessary to add to the preemption analysis promulgated and followed by this Court since its 1983 decision in *Shaw*, *supra*. It is also surprising that the Sixth Circuit would commence its analysis (76 F.3d at 754) by reference to its own three-part inquiry developed in *Firestone Tire & Rubber Company v. Neusser*, 810 F.2d 550 (6th Cir. 1987), before applying this Court's *Shaw* standard, the supreme and uniform law of the land concerning ERISA preemption of state statutes.

Since the decision of the Sixth Circuit in *Firestone* preceded those decisions of this Court in *Mackey*, *supra*; *FMC*, *supra*; *Greater Washington*, *supra*, and *New York Blue Cross*, *supra*, the employment of an independent three-part test by the Sixth Circuit might have been understandable. However, in light of the fact that this Court has never endorsed any ERISA preemption analysis other than the reference to or connection with branches of the *Shaw* test, continuing reliance on additional, non-uniform standards of analysis by the Sixth Circuit is puzzling. The decision in *Firestone* actually supports the decision of the district court in *Akzo*. Unlike the Akron City Income Tax Ordinance, a truly general and nonspecific 2 percent tax on all income earned by employees

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[7] (1) Does the state statute have a connection with a covered employee benefit plan?; (2) Does the state statute have a reference to a covered employee benefit plan?; and, in *either* event, (3) Does the state law relate to the plan in something more than a tenuous, remote and peripheral manner? The second three-part inquiry consists of the following: (1) whether the law constitutes a traditional exercise of state authority; (2) whether it affects relations among the principal ERISA entities – the employer, the plan, the plan fiduciaries, and the beneficiaries – or relations between one of these entities and an outside party; and (3) whether it has any more than a tenuous or peripheral affect on a covered plan.

(it did not contain any reference to ERISA plans), the SBTA contains a specific reference to ERISA plans. Thus, the SBTA is evaluated as a "reference to" statute whereas the Akron ordinance was evaluated as a "connection with" statute, a framework that calls into play the tenuous, remote or peripheral analysis. Reflecting on *Firestone*, the Sixth Circuit noted 'the fundamental principle of comity between federal courts and state governments that is essential to "Our Federalism," particularly in the area of state taxation.' *Thiokol*, 76 F.3d at 755. While comity may be the general rule, this generality must yield to a specific prohibition from the Congress to the states to refrain from enacting "any state tax law" insofar as they may now or hereafter relate to any employee benefit plan. 29 U.S.C. § 1144.[8]

The court below sought to support its aberrant three-part ERISA preemption analysis by citation to the since-discredited[9] and heavily criticized decision of the Third Circuit Court of Appeals in *United Wire Metal & Mach. Health & Welfare Fund v. Morristown Memorial Hospital*, 995 F.2d 1179 (3rd Cir. 1993); *cert. denied*, ___ U.S. ___, 126 L.Ed.2d 332, 114 S.Ct. 383 (1993).[10] In light of the numerous cases

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[8] The Court should note that affirming the decision of the lower court in favor of Plaintiffs herein will not invalidate the entire tax, but only the portion of § 4(3) of the SBTA that contains the reference to ERISA benefit plans.

[9] *Travitz v. Northeast Dept. ILGWU Health and Welfare Fund*, 13 F.3d 704 (3d Cir. 1994), *cert. denied*, 128 L.Ed.2d 88, 114 S.Ct. 2165 (1994), and *New England Health Care Employees Union v. Mount Sinai Hospital*, 846 F.Supp 190 (D. Conn. 1994), rev'd, remanded, 65 F.3d 1024 (2nd Cir. 1995).

[10] The *United Wire* three part test for determining preemption: A rule of law relates to an ERISA plan if it is specifically designed to affect employee benefit plans (fn. 3), if it singles out such plans for special treatment (fn. 4), or if the rights or restrictions it creates are predicated on the existence of such a plan (fn. 5). *United Wire*, 955 F.2d at 1192.

which have disagreed with *United Wire*, any reliance on *United Wire* is misguided.[11]

C. SINGLE BUSINESS TAX LIABILITY AS DETERMINED BY "REFERENCE TO" EMPLOYEE BENEFIT PLANS

This Court has long recognized the taxing power as one which must be wielded carefully. "The power to tax is the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat. 316), 4 L.Ed. 579 (1819). This admonition was just recently applied by the Court in a federal preemption case. *Livadas v. Bradshaw*, 512 U.S. ___, 129 L.Ed.2d 93, 107, 114 S.Ct. 2068 (1994). Where, as here, Congress has removed from the states the power to legislate with regard to employee benefit plans, especially state tax laws that relate to a plan, the admonition in *McCulloch* could not possibly be more meaningful.

This Court has consistently held that state law directives requiring that reference be made to an employee benefit plan covered by ERISA are preempted. *Greater Washington*, 121 L.Ed.2d at 521. It can be no different with the SBTA. Just as

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[11] The schism between the Third Circuit and this Court which the decision in *United Wire* represents is reminiscent of that which arose in *FMC*, *supra*. There the Third Circuit adopted an unduly restrictive "core issue" test with regard to the scope of the deemer clause of ERISA (a benefit plan shall not be deemed an insurance company for purposes of the insurance savings clause). This Court reversed. Regrettably, in *United Wire*, the Third Circuit returned to the discredited theme that preemption should only occur with respect to those issues which are at the "core" of the ERISA legislation such as coverage, vesting, funding and the like. *United Wire*, 955 F.2d at 1192. This continuing attitude is quite startling in light of the repeated determinations by this Court that the preemption clause extends not only to state laws specifically designed to affect employee benefit plans, *FMC*, 112 L.Ed.2d at 364, or to those state laws dealing with subject matters covered by ERISA, *Shaw*, 77 L.Ed.2d at 501, but even to state laws that are consistent with ERISA's substantive requirements. *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724, 85 L.Ed.2d 728, 740, 105 S.Ct. 2380 (1985).

the health insurance coverage that the District of Columbia employers in *Greater Washington* were required to provide for eligible employees was measured by reference to the existing health insurance coverage provided by the employer, a welfare benefit plan under ERISA, so too is the SBT liability of the employer measured by reference to its plan contributions. For the same reason that the District of Columbia statute imposing this obligation was preempted in *Greater Washington*, the SBT definition of compensation which includes these payments must, to the extent of the inclusion, be preempted.[12]

D. THE SBTA HAS A CONNECTION WITH AND EFFECT UPON THE EMPLOYEE BENEFIT PLANS OF THE PETITIONERS

Setting aside (but not conceding) the question of whether SBTA § 4(3) is preempted on the basis of its "specific reference", there can be no doubt that the SBTA has a connection with and impact upon the ERISA plans of petitioners.

This Court has found state statutes to have a connection with employee benefit plans even if not specifically designed to affect covered plans, and even though they did not deal with subject matters covered by ERISA. State law frustration of Congressional intent is also an underlying concern. *Shaw*, 77 L.Ed.2d at 501 and (especially) n.15. Petitioners recognize that the Court has observed that preemption does not occur if

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[12] The cause of action for wrongful discharge in *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 112 L.Ed.2d 474, 111 S.Ct. 478 (1990), was preempted because the Texas cause of action made reference to and was premised on the existence of a pension plan. Since a prevailing plaintiff must prove the existence of an ERISA plan and a pension defeating motive by the terminating employer, the Court's inquiry must be directed to the plan. In the case of the Michigan SBT, the tax responsibility and liability of the employer cannot be determined without assuming the existence of and making reference to the payments which the sponsoring employer makes to the employee benefit plans covered by ERISA. The *Thiokol* District Court acknowledges at 858 F.Supp., p. 679, that the tax is calculated, under the statutory method, "by reference to plan contributions."

the state law has only a "tenuous, remote or peripheral connection with covered plans." *Greater Washington*, 121 L.Ed.2d at 520, n.1 (citing *Shaw*). However, the *Shaw* Court found that even state laws that did not contain a specific reference to ERISA plans could nonetheless be found to relate to the plans.

The SBTA affects relations among the principal ERISA entities (the employer, the plan, the plan fiduciaries and the beneficiaries) in several respects. The Petitioners are administrators, sponsors and fiduciaries of virtually all of the plans affected by the Michigan SBT and are participants in the rest. The SBTA affects the Petitioners in their capacities as sponsoring employers because Petitioners' SBT liability is determined by direct reference to the plan contributions they make as plan-sponsoring employers. The SBT liability is important to the Petitioners in determining what level of benefit they determine to provide to their employees. In response to the tax, the Petitioners can change the level of benefits offered to the employees.[13] The observation of the Court below on this point is in error. At page 755, the Court says the SBT applies to all employers doing business in Michigan whether or not they contribute to ERISA plans. In making this observation, the Court demonstrates it lost sight of the relief which the Petitioners requested of it. It is not the entire tax the Petitioners seek to have adjudged preempted by ERISA. Rather, it is only that portion of subsection (3) of section 4 of the act which requires the addback of ERISA plan contributions which Petitioners challenge. Further, while the entire tax may apply to employers without regard to whether they contribute to employee benefit plans, the portion of subsection 4(3) of the act about which Petitioners complain ***only*** applies to employers to the extent that they ***do*** contribute to employee benefit plans. The Court below then concludes that the SBT is saved from preemption because it is not specifically designed

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[13] This, of course, has an obvious and direct effect on Plaintiffs' employees as plan beneficiaries, and the plan itself, two other "principal ERISA entities" identified by the court in *Firestone*.

to affect employee benefit plans. *Thiokol*, 76 F.3d at 755, 760. At pages 759-60, the Court said: "[S]tatutes that refer to ERISA plans are struck down not because of the reference, but because of their intended effect." This statement plainly ignores the holdings of this Court in *Mackey*, *supra*, and *FMC*, *supra*, that specific design or intent to affect employee benefit plans is irrelevant to an ERISA preemption. The Court below even goes so far as to reason that there may be some statutes intended to specifically effect ERISA plans but which are still not preempted! *Supra*, at 760.

At this point in the analysis, it is important to recall the uncontroverted testimony of Morton's Vice President of Human Resources, John C. Hedley. Mr. Hedley indicated that there was a clear relationship between the state tax burden imposed on Morton by the SBTA and the level of employee benefits offered by the company. He said the state tax burden was important to Morton in determining what the company would offer its employees in the way of current and future benefits (App. 86) and that, in response to state taxes, the level of benefits could be changed (App. 88). Even the Sixth Circuit decision below would support a finding of preemption in this instance. The Sixth Circuit acknowledged, at page 757, " . . . Congress's purpose in enacting ERISA, *vis.*, to avoid encouraging 'employers with existing plans to reduce benefits, [or] those without such plans to refrain from adopting them.' *Fort Halifax Packaging Co., Inc. v. Coyne*, 482 U.S. 1, 11, 107 S.Ct. 2211, 2217, 96 L.Ed.2d 1 (1987)." *Thiokol*, 76 F.3d at 757.

Absent congressional action, this Court has allowed states wide latitude in fashioning state tax systems and apportionment mechanisms. *Norfolk & Western Railway Company v. Missouri State Tax Com.*, 390 U.S. 317, 19 L.Ed.2d 1201, 1206, 88 S.Ct. 995 (1968); *Wisconsin v. J.C. Penney Company*, 311 U.S. 435, 445, 85 L.Ed. 267, 61 S.Ct. 246 (1940); *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 77 L.Ed.2d 545, 552, 103 S.Ct. 2933 (1983). One example of congressional action in the state tax area is 15 U.S.C. § 381 (P.L. 86-272). Premised upon the commerce clause (App. 67), this law prohibits state income taxation if a taxpayer's activities within the state are limited to sales solicitation activities.

Wisconsin Dep't. of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 120 L.Ed.2d 174, 112 S.Ct. 2447 (1992). P.L. 86-272 represents one of the very few instances in which Congress has legislated a limit on state taxing power. ERISA is another. It preempts state tax laws that relate to employee benefit plans. Congress has expressed an intent to completely occupy the field, prohibiting states from enacting laws which make reference to a covered employee benefit plan or to establish rights or responsibilities under state law by reference to ERISA plans, "and any state law imposing requirements by reference to such covered programs must yield to ERISA." *Greater Washington*, 121 L.Ed.2d at 521. ERISA calls for preemption when a state law has a reference to or connection with a plan and "that is the end of the matter." *Id.* at 522. Michigan was wrong to legislate in its tax a specific reference to ERISA-covered plans, an area which Congress has told states not to invade.[14]

There is another area in which the Congress has exercised its power in reference to state tax laws. In 31 U.S.C. § 3124, the Congress has prohibited states from taxing obligations of the United States Government, in order to prevent taxes that diminish "in the slightest degree" the market value or investment attractiveness of obligations issued by the United States. *New Jersey Realty Title Insurance Company v. Division of Tax Appeals*, 338 U.S. 665, 94 L.Ed. 439, 70 S. Ct. 413 (1950). A state tax is barred regardless of its form if federal obligations must be considered either directly or indirectly in computing the tax. In *American Bank & Trust Company v. Dallas County*, 463 U.S. 855, 103 S.Ct. 3369, 77 L.Ed.2d 1072, 1079 (1983) the Court found a tax on bank shares was subject to § 3124 and therefore prohibited because the tax was based on an equity

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[14] In *Ingersoll-Rand*, the Court said, "[W]here, as here, Congress has expressly included a broadly worded preemption provision in a comprehensive statute such as ERISA, our task of discerning congressional intent is considerably simplified." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 112 L.Ed.2d 474, 483, 111 S.Ct. 478 (1990), *superseded in part on other grounds as stated in Spinelli v. Gaughan*, 12 F.3d 853 (9th Cir. 1993).

capital formula which required the taxpayer to determine the value of its capital assets including federal obligations. In finding that § 3124 prohibited the state tax, this Court said, "Plainly, such a tax takes into account, at least indirectly, the federal obligations that constitute a part of the bank assets." *Id.* at 1079.

These § 3124 cases involved taxes which are no different in concept than the SBTA. The value of the federal obligations in *American Bank & Trust Company* were considered at least indirectly in determining the bank assets. Similarly, the contributions which Petitioners make to their ERISA employee benefit plans are taken into account, at least indirectly, in determining single business tax base. In each case, the Congress has prohibited the state tax, even in instances in which the tax is not imposed exclusively or even predominantly on federal obligations in the case of the § 3124 prohibition, and employee benefit plan contributions in the case of the ERISA prohibition.

Although SBT liability is determined in part by reference to employee benefit plan contributions, the Sixth Circuit refused to hold the tax preempted to that extent, reasoning that Michigan could have enacted a *different* tax in place of the SBT which did not contain a specific reference to employee benefit plan contributions (i.e., a law of general applicability which would have no connection with covered employee benefit plans) and therefore the fact that Michigan enacted a tax containing a specific reference to employee benefit plans should not matter. *Thiokol*, 76 F.3d at 756. The answer to this reasoning by the court below has been provided by this Court. Long ago, and again just recently, this Court recognized that a constitutionally infirm tax may not be preserved by an argument that the state could have raised the same tax revenue by imposing a constitutionally valid excise. *McLeod v. J.E. Dilworth Company*, 322 U.S. 327, 88 L.Ed.2d 1304, 64 S.Ct. 1023 (1944)[15] Just recently, in *Oklahoma Tax Commission v.*

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[15] "It is suggested, however, that Arkansas could have levied a tax of the same amount on the use of these goods in Arkansas by the Arkansas

Jefferson Lines, Inc., ___U.S. ___, 131 L.Ed.2d 261, 115 S.Ct. 1331 (1995), the Court sustained an unapportioned sales tax imposed upon the gross receipts from the sale in Oklahoma of a bus ticket for interstate transportation and, at the same time, reaffirmed the vitality of its decision in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 92 L.Ed. 1633, 68 S.Ct. 1260 (1948), which held that an unapportioned New York tax on gross receipts from interstate transportation services was unconstitutional. The economic equivalence of the two taxes notwithstanding, the Court instructed that it is the actual tax imposition which is drawn into question which must survive analysis and not a hypothetical "could have" tax conjured up in an effort to save the case.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT THE PREEMPTION CLAUSE OF ERISA, 29 U.S.C. § 1144(a), DOES NOT PREEMPT THE 90 DAY LIMITATIONS PERIOD SPECIFIED IN MICH.COMP.LAWS ANN. § 205.27a(6).

Mich.Comp.Laws Ann. § 205.27a(2) (West Supp. 1995) (App. 74) provides in relevant part, "The taxpayer shall not claim a refund of any amount paid to the Department after the expiration of four years after the date set for the filing of the original return." Mich.Comp.Laws Ann. § 205.27a(6) provides, "Notwithstanding the provisions of subsection (2), a claim for refund based upon the validity of a tax law based on the laws or Constitution of the United States or the State

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buyers, and that such a use tax would not exceed the limits upon state power derived from the United States Constitution. Whatever might be the fate of such a tax were it before us, the short answer is that Arkansas has not chosen to impose such a use tax. . . . A sales tax and use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds." *McLeod*, 322 U.S. at 330.

Constitution of 1963 shall not be paid unless the claim is filed within 90 days after the date set for filing a return." (App. 75) In the Court below, Petitioners contended that ERISA preempts that portion of subsection (6) which singles out refund claims based upon a federal law such as ERISA for treatment different than that accorded to most other refund claims.

The SBTA preemption issue is closely aligned with the Revenue Act preemption issue. Both issues are decided by reference to the same principles distilled from federal statutory and case law addressed in the preceding discussion. The reasoning critical to whether ERISA preempts a portion of the SBTA applies with equal force to the question whether ERISA preempts this bar to claims. By the unnecessarily and unreasonably short 90 day limitations period specified in § 205.27a(6), Respondents seek to prevent the Petitioners from obtaining meaningful redress for the violation of their federally-protected rights.

The question of preemption of § 27a(6) is virtually identical to whether ERISA preempts a cause of action or defense thereto, see, *e.g.*, *Ingersoll-Rand*, *supra*, in which the Court held that the mere need to refer to the existence of an ERISA plan in evaluating the plaintiff's entitlement to relief was sufficient to bring the cause of action within ERISA's preemption clause. The Court below said the Michigan statute of limitations was, like the garnishment statute in *Mackey*, *supra*, "likely to have some effect on ERISA-based challenges to Michigan tax laws. But any effect will be at most remote or peripheral." However, the effect of the Michigan statute of limitations will be to completely preclude a cause of action for ERISA preemption of the taxation of employee benefit plan contributions. There is nothing tenuous, remote or peripheral about a complete and total divestiture of an otherwise enforceable right. The Michigan short statute of limitations is aimed squarely at rights emanating from a federal statute: rights entitled to the protections afforded by the federal constitution. In explicit terms, the Michigan statute of limitations refers to federal statutes. The rationale of the decision of this Court in *Mackey*, *supra*, was that Congress, in permitting suits by and against ERISA employee benefit

plans, also contemplated that money judgments against ERISA plans must be collectible in some way, garnishment being one permissible method. In stark contrast is the short statute of limitations imposed by Michigan with regard to rights arising under federal statutory or constitutional provisions. It certainly cannot be said that Congress anticipated state legislation treating such rights more harshly than usual under a statute of limitations such that Congressional silence on the subject should be taken as an endorsement of what on its face is an unreasonably short and discriminatory state law that has a dramatic impact on the ERISA issue involved in this case.

III. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT A FEDERAL COURT LACKS JURISDICTION TO CONSIDER A DECLARATORY JUDGMENT ACTION REQUESTING AS RELIEF A DETERMINATION THAT A 90 DAY STATUTE OF LIMITATIONS, WHICH RESTRICTS THE RIGHT OF A MICHIGAN TAXPAYER TO CONTEST A MICHIGAN TAX ON GROUNDS THAT THE TAX VIOLATES A FEDERAL STATUTE SUCH AS ERISA OR A CONSTITUTIONAL PROVISION, VIOLATES THE UNITED STATES CONSTITUTION IN LIGHT OF 28 U.S.C. § 1341.

Neither of the cases which the Court below cited as authority for holding that the district court lacked jurisdiction require that, either under the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, or through application of the restraint doctrine, the Petitioners' due process and equal protection challenges to Michigan's highly constricted limitations period are beyond the jurisdiction of federal courts.

In *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 103; 70 L.Ed.2d 271; 102 S.Ct. 177, 179-80 (1981), the taxpayers sought redress of allegedly unfair property tax assessments by bringing a damages action against county and state officials under 42 U.S.C. § 1983. The precise

question before this Court was whether the taxpayer's § 1983 damages action was barred by the TIA and the principle of comity. This Court reviewed the theory of the TIA and the policy of equitable restraint founded on comity.

This Court concluded that "the principle of comity which predated the [Tax Injunction Act] was not restricted by its passage" (70 L.Ed.2d at 280), and that the relief sought by the *Fair Assessment* litigants would have a widely intrusive and disruptive effect – a consideration common to both the TIA and the equitable restraint doctrine – on the state's ability to administer its taxing scheme. Such disruption would likely occur because every key tax official would be forced to defend assessment practices which, the Court noted, were perhaps outside of their individual control; in addition, the litigation would create a "chilling effect upon the actions of all County officers governed by the same practicalities or required to implement the same policies." 70 L.Ed.2d 283. Given the onerous intrusion engendered by the action, this Court held that the plaintiffs were prevented from seeking redress from the federal district court in a § 1983 action for damages. Instead, "[s]uch taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete. . . . " 70 L.Ed.2d 283.[16]

Fair Assessment does note, as did the Court below, that declaratory judgment actions fall within the boundaries of both the TIA and the comity principle. However, both the TIA and the equitable restraint doctrine require that federal jurisdiction be retained where it is evident that the state court remedies available to the taxpayers are inadequate. In *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 87 L.Ed. 1407, 63 S.Ct. 1070 (1943), a group of employers initiated

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[16] The Court in *Fair Assessment*, 70 L.Ed.2d at 283, n.8, "discern[ed] no significant difference, for purposes of the principles recognized in this case, between remedies which are 'plain, adequate, and complete,' as that phrase has been used in articulating the doctrine of equitable restraint, and those which are 'plain, speedy and efficient,' within the meaning of the Tax Injunction Act."

suit in federal district court against a state unemployment compensation administrator in anticipation of payment of the state's unemployment tax, seeking a declaration that the tax was unconstitutional as applied. Both the district court and the court of appeals upheld the tax in the face of petitioners' constitutional challenges. In reviewing the case, this Court discussed the comity principle, noted the policy considerations central to the restraint doctrine (that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer). *Matthews v. Rodgers*, 284 U.S. 521, 76 L.Ed. 447, 52 S.Ct. 217 (1932), and determined that identical considerations preclude federal courts from awarding relief through the declaratory judgment mechanism.

The restrictions of the TIA apply to state laws involving "the assessment, levy or collection of any tax," 28 U.S.C. § 1341. The Court below did not consider whether the challenged statute of limitations is, in the first instance, a state law involving the assessment, collection or levy of a tax. In several instances, courts have determined that the TIA is inapplicable where the litigant's federal court challenge is directed to something other than a state tax.[17] The constitutional challenge advanced by Petitioners is not tantamount to a request that the federal court enjoin or declare the nullification of a state tax. Petitioners simply wish to have the federal court, in connection with its resolution of the other intrinsically related claim (ERISA preemption that is exclusively within the jurisdiction of the federal court), decide whether a limitations period which affects the timing for the filing of certain refund claims suffers from constitutional infirmities. This question is not within the intended scope of the TIA, nor

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[17] *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984); *American Petrofina Co. of Texas v. Nance*, 859 F.2d 840 (10th Cir. 1988).

does the principle of comity, in which the TIA has its roots, require that federal courts refrain from deciding the issue.[18]

The Petitioners' claim rests upon the validity of a limitations period that, under specified circumstances, operates to cut off a taxpayer's claim **in advance of the general limitations period that applies to all other taxpayers, and that is not being challenged in this case.** Thus, the validity of a particular tax as applied to one or more taxpayers is not at all affected by the Petitioners' success in ultimately persuading this Court (or the Sixth Circuit on remand) that § 27a(6) presents a serious impairment to one or more federal constitutional guarantees.

The conclusion of the Court below appears to rest in part upon the placement of § 27a(6) within the Revenue Act. However, federal courts are not bound by the Michigan Legislature's decision to place § 27a(6) within the enactment [the Revenue Act, 1941 P.A. 212, as amended, Mich.Comp.Laws App. § 205.1 *et seq.* (West 1986 & Supp. 1995)], which governs the administration of its tax laws. Insertion of § 27a(6) within the Revenue Act was pursuant to state authority to enact statutes of limitations prescribing time periods in which litigants may bring suit to contest the validity of governmental action,[19] and does not thereby transform it into a law involving the "assessment, levy or collection of any tax," 28 U.S.C. § 1341. The provision could as easily have been incorporated within the omnibus limitations periods found in Michigan's Revised Judicature Act, 1961 P.A. 236, as amended, Mich.Comp.Laws App. § 600.101 *et seq.* (West 1981). Federal courts are not bound by the labels states have affixed to their own laws. The boundaries of the TIA should be determined as

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[18] *McKay v. Horn*, 529 F.Supp. 847 (D.N.J. 1981); *Superior Oil Co v. City of Port Arthur*, 535 F.Supp. 916 (E.D. Tex. 1982); *Rivera v. Patino*, 524 F.Supp. 136 (N.D. Cal. 1981); *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975).

[19] *Price v. Hopkin*, 13 Mich. 318 (1865); see also, *Mobil Oil Corp v. Tully*, 639 F.2d. 912 (2nd Cir. 1981), cert. denied, 452 U.S. 967, 69 L.Ed.2d 981, 101 S. Ct. 3123 (1981).

a matter of federal law by reference to the Congressional policies that underlie the TIA. *Robinson Protective Alarm Co. v. Philadelphia*, 581 F.2d 371, 374 (3d Cir. 1978).

The TIA bars federal courts from enjoining state tax collection only "where a **plain, speedy and efficient remedy** may be had in the Courts of such state." (emphasis supplied) 28 U.S.C. § 1341. In a similar vein, the principle of comity, which may be applied in the absence of application of the TIA to restrain federal courts from interfering with the states' exercise of their taxing powers, *Fair Assessment*, 70 L.Ed.2d 271, requires that any state court remedy be adequate; the "adequacy" requirement in the context of comity conforms with the TIA dictate that the remedy be plain, speedy and efficient, see footnote 16, *supra*.

In this case, the declaratory judgment action instituted in federal district court is but one element of an action of which this Court *does* have jurisdiction. The remaining elements of the litigation address the question of ERISA preemption relating both to the compensation definition found in the SBTA, as well as the shortened statute of limitations. In this setting, the state court remedy available to petitioners is a far cry from "efficient".

All state court matters relating to the question of ERISA preemption of the compensation definition contained in Michigan's SBTA are being held in abeyance by virtue of state court administrative orders, pending the outcome of the present federal litigation. App. 124 is an example of a state court administrative order entered in a case brought by Thiokol Corporation, in which the Michigan Treasury has asserted the applicability of the 90 day limitations period as an affirmative defense. If, as the Court below held, the Petitioners must pursue their federal due process and equal protection claims in the state courts, when abeyances ordered by the state courts are eventually lifted, the state court remedy is not "speedy."

The due process and equal protection issues have arisen in connection with the ERISA preemption claims that indisputably are properly within the district court's jurisdictional purview. Here, efficiency is only well served if the question of the constitutionality of § 27a(6) is considered in tandem with

Petitioners' ERISA claims. Although, under the TIA, the state court remedy need not be as substantively adequate as the remedy available in the federal courts to satisfy the seminal requirement that the state remedy be "plain, speedy and efficient," *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 67 L.Ed.2d 464, 101 S.Ct. 1221 (1981), unusual circumstances, *e.g.*, those involving procedural inadequacies or deficiencies in the state setting, present a basis for non-application of the TIA, see, *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 96 L.Ed. 335, 72 S.Ct. 321 (1952) (in which resort to the state courts would have necessitated a multiplicity of litigation); *Northwest Airlines, Inc. v. Tennessee State Board Equalization*, 11 F.3d 70 (6th Cir. 1993) (involving the presence of inadequate review procedures in the state setting). Petitioners submit that the unique facts attendant to this matter – in which Petitioners' ERISA preemption claims, which they *cannot* litigate in state court, are closely aligned with the constitutional challenges levelled at § 27a(6) – similarly warrant non-application of the TIA. In *Fair Assessment*, *supra*, this Court held that federal courts are barred from entertaining taxpayers' § 1983 tax-related challenges. However, *Fair Assessment* litigants did not assert other inexorably related claims that *required* the exercise of federal jurisdiction. Unlike the *Fair Assessment* plaintiffs, Petitioners **must** bring their injunctive and declaratory claims in federal court because their ERISA challenges fall within the exclusive jurisdiction of the federal courts. Petitioners' § 27a(6) challenge to Michigan's Draconian 90 day limitations period is simply a continuation of the thread of their ERISA claims. Further, the challenge to § 27a(6) unquestionably falls within the general federal question jurisdiction of federal courts, *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 52 L.Ed 78, 28 S.Ct. 7 (1907); in addition, 28 U.S.C. § 2201 (App. 68), authorizes federal courts to entertain requests for declaratory rulings relating to such questions.

The principle that federal courts should refrain from assuming jurisdiction of controversies involving state taxes rests upon a policy recognition that federal court interference would throw state tax administration "into disarray, and taxpayers might escape the ordinary procedural requirements

imposed by state law." *Perez v. Ledesma*, 401 U.S. 82, 128, n.17; 27 L.Ed.2d 701; 91 S.Ct. 674 (1971). Surely, under the circumstances evident here, the exercise of federal court jurisdiction over the question whether Michigan's restrictive 90 day limitations period violates federal equal protection and due process requirements would not at all impair the ability of the state authorities to go about their daily activities. In the event a federal court determines that § 27a(6) violates constitutional requirements, the state is not left without a limitations period applicable to state tax matters, for the four-year limitations provision set forth in § 27a(2) would apply, as it already does in nearly every other setting. **Indeed, a more serious and protracted threat to the state's administration of its taxing scheme is presented by allowing this question to be decided in the multiple pending state court actions; without a doubt, a determination of the constitutionality of § 27a(6) made by this Court in the context of Petitioners' related ERISA claims would have universal application, and would resolve the issue with precision, authority and finality.** As such, a recognition of federal court jurisdiction under these circumstances would not **inhibit**, but would **promote** the policy considerations which underlie both the TIA and the comity principle.

CONCLUSION

For all the reasons stated, Petitioners pray that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted:

HOWARD & HOWARD ATTORNEYS, P.C.
PATRICK R. VAN TIFLIN
Counsel of Record
MICHELE L. HALLORAN
KIM D. CROOKS
The Phoenix Building, Suite 500
222 Washington Square, North
Lansing, Michigan 48933-1817
Telephone: (517) 485-1483

THIOKOL CORPORATION, MORTON INTERNATIONAL, INC. (as successors through corporate reorganization to Morton, Thiokol, Inc.) and Bee Chemical Company, Plaintiffs-Appellants,

v.

Douglas B. ROBERTS, in his official capacity as Treasurer of the State of Michigan, and Thomas M. Hoatlin, in his official capacity as Commissioner of Revenue of the State of Michigan, Defendants-Appellees.

AKZO AMERICA, INC., a Delaware corporation, Akzo Chemicals, Inc., a Delaware corporation, Akzo Coatings, Inc., a Delaware corporation, Akzo Salt, Inc., a Delaware corporation, Beecham, Inc. (TN), a Tennessee corporation, Beloit Corp., a Delaware corporation, BOC Group, Inc., a Delaware corporation, BOC Healthcare Inc., a Delaware corporation, Butler Manufacturing Co., a Delaware corporation, Coca Cola Company, a Delaware Corporation, Georgia-Pacific Corp., a Georgia corporation, Hanischfeger Corp., a Delaware Corporation, Jefferson Smurfit Corp., a Delaware Corporation, Kroger Co., an Ohio Corporation, M-I Drilling Fluids Co., a Texas partnership, May Department Stores Co., a New York corporation, Miles, Inc., an Indiana corporation, Quaker Chemical Corp., a Pennsylvania corporation, Sears Roebuck and Co., a New York Corporation, Timken Company, an Ohio corporation, UpJohn Corporation, a Delaware corporation, and W.R. Grace & Co., a Connecticut corporation, Plaintiffs-Appellees/Cross-Appellants,

v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN; Douglas B. Roberts, in his official capacity as Treasurer of the State of Michigan; and

Thomas M. Hoatlin, in his official capacity as Commissioner of Revenue of the State of Michigan, Defendants-Appellants, Cross-Appellees.

Nos. 94-1903, 95-1116 and 95-1171.

United States Court of Appeals,
Sixth Circuit.

Argued Dec. 4, 1995.

Decided Feb. 23, 1996.

Separate actions were brought challenging Michigan's Single Business Tax as preempted by the Employee Retirement Income Security Act (ERISA). After remand in one action, 987 F.2d 376, the United States District Court for the Western District of Michigan, Douglas W. Hillman, Senior District Judge, 858 F.Supp. 674, determined that tax was not preempted. In other action, the District Court, Sam H. Bell, J., 1995 WL 44043, held that tax was preempted. Appeals were taken. The Court of Appeals, Kennedy, Circuit Judge, held that: (1) tax was not preempted by ERISA, and (2) statute of limitations was not preempted by ERISA.

Affirmed in part, reversed in part, and remanded in part.

On Appeal from the United States District Court for the Western District of Michigan.

Patrick R. Van Tiflin (argued and briefed), Howard & Howard, Lansing, MI, for Thiokol Corp., Bee Chemical Co.

Richard R. Roesch, Office of Atty. Gen. of Michigan, Lansing, MI, for Department of Treasury, State of Mich., Revenue Div.

Michael R. Bell, Office of Atty. Gen. of Mich., Daniel M. Greenberg (argued and briefed), Lansing, MI, for Douglas B. Roberts, Thomas M. Hoatlin.

James H. Geary, Patrick R. Van Tiflin (argued and briefed), Michele L. Halloran (briefed), Howard & Howard, Lansing, MI, for Akzo America, Inc., Akzo Chemicals, Akzo Coatings, Inc.

Russell E. Prins, Michael R. Bell (briefed), Office of Atty. Gen. of Michigan, Daniel M. Greenberg (argued), Lansing, MI, for Department of Treasury, State of Mich., for Douglas B. Roberts, Thomas M. Hoatlin.

Before: BROWN, KENNEDY, and GUY, Circuit Judges.

KENNEDY, Circuit Judge.

In this consolidated appeal from divergent District Court opinions, we are required to decide whether § 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), pre-empts the Michigan Single Business Tax, Mich.Comp.Laws Ann. § 208.1 *et seq* (West 1986 & Supp.1995). Michigan's Single Business Tax ("SBT") requires taxpayers doing business in Michigan to include within their tax base all compensation, including payments to employee benefit plans covered by ERISA. In *Thiokol Corp. et al. v. Roberts,* 858 F.Supp. 674 (W.D.Mich.1994) (94-1903), the District Court found that ERISA did not pre-empt the SBT. In *Akzo America, Inc. et al. v. Michigan Dep't of Treasury,* No. 4:93-CV-101, 1995 WL

44043 (W.D.Mich. Jan.13, 1995) (95-1116), the District Court found that ERISA did pre-empt the SBT. We conclude that ERISA does not pre-empt the SBT, and shall reverse in 95-1116 and affirm in 94-1903.

We also affirm the District Court's ruling in *Akzo America, Inc. et al. v. Michigan Dep't of Treasury,* No. 4:93-CV-101, 1995 WL 44043 (W.D.Mich. Jan.13, 1995) (95-1171), that Michigan's 90-day statute of limitations for filing a refund request on the grounds that a tax violates the federal constitution, Mich.Comp.Laws Ann. § 205.27a(6) (West Supp.1995), is not pre-empted by ERISA. Yet we reverse the District Court's holding that this statute of limitations does not violate equal protection or due process, for it lacked jurisdiction to decide these issues.

I

Michigan's SBT levies a 2.35 percent tax on businesses' adjusted tax base. The SBT defines the tax base as the sum of a business's compensation to officers and employees, depreciation, interest payments, and profits. The compensation prong of the tax base is based on certain adjustments made to taxable income as defined under the Internal Revenue Code. The SBT includes within the definition of compensation employers' payments to retirement and health benefit plans.[1]

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[1] Under Michigan's Single Business Tax,

> "Compensation" means all wages, salaries, fees, bonuses, commissions, or other payments made in the taxable year on behalf of or for the benefit of

Thiokol Corporation and AKZO America, Inc. are corporations doing business in Michigan. Each corporation sponsors employee benefit plans governed by ERISA and files Michigan SBT returns. Each corporation brought an action in federal court seeking, *inter alia*, declaratory relief in the form of an order finding Michigan's SBT pre-empted by ERISA.

The District Court in *Thiokol* held that because Michigan's SBT has only a tenuous connection with a covered plan, it was not pre-empted by ERISA. It also held that the SBT's mere reference to such plans was insufficient to justify pre-emption absent an effect that was more than tenuous, remote, or peripheral. In doing so, the District

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> employees, officers, or directors of the taxpayers and subject to or specifically exempt from withholding under section 3401 of the internal revenue code. Compensation includes, on a cash or accrual basis consistent with the taxpayer's method of accounting for federal income tax purposes, payments to state and federal unemployment compensation funds, payments under the federal insurance contribution act and similar social insurance programs, payments, including self-insurance, for workmen's compensation insurance, payments to individuals not currently working, payments to dependents and heirs of individuals because of current or former labor services rendered by those individuals, payments to a pension, retirement, or profit sharing plan, and payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans and payments of fees for administration of health and welfare and noninsured benefit plans.

Mich.Comp.Laws Ann. § 208.4(3) (West 1995) (footnote omitted).

Court in *Thiokol* held that *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992) did not require pre-emption solely on the basis of a reference to contributions to a covered plan.

In contrast, the District Court in *Akzo* held that under *Greater Washington*, once a statute contains any reference to ERISA or to a covered plan it is thereby pre-empted. Having found that Michigan's SBT contained a reference to covered plans, and that *Greater Washington* obviated the need to analyze whether the SBT had more than a tenuous, remote, or peripheral effect on a covered plan, the District Court in *Akzo* held that Michigan's SBT was pre-empted. We review both District Court's grants of summary judgment *de novo*. *City Mgmt. Corp. v. United States Chem. Co.*, 43 F.3d 244, 250 (6th Cir.1994).

The District Court in *Akzo* also held that ERISA did not pre-empt Mich.Comp.Laws Ann. § 205.27a(6) (West Supp.1995), which imposes a 90-day statute of limitations on claims for refunds based on a taxpayer's challenge to the constitutionality of a state tax law. It also held that this statute of limitations does not violate the federal constitutional guarantees of due process and equal protection.

II

ERISA supersedes state laws that "relate to any employee benefit plan" covered by ERISA, and the Supreme Court has noted that "Congress used the words 'relate to' in § 514(a) in their broad sense." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98, 103 S.Ct. 2890, 2900, 77

L.Ed.2d 490 (1983). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-97, 103 S.Ct. at 2900. Moreover, a law that refers to or has an connection with an employee plan covered by ERISA is pre-empted "even if the law is not specifically designed to affect such plans, or the effect is only indirect, and even if the law is consistent with ERISA's substantive requirements." *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (1992) (citations and internal quotations omitted). Nevertheless, the Supreme Court has carved out an exception that saves from pre-emption those state laws that "affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 n. 21. In the footnote raising this exception, the Court acknowledged the difficulty of determining what state laws fit within this narrow exception. *Id.* Nevertheless, the Supreme Court has continued to cite this footnote and has thus recognized the continuing viability of the *Shaw* exception. *See Greater Washington*, 506 U.S. at 130 n. 1, 113 S.Ct. at 583 n. 1; *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, ___, 115 S.Ct. 1671, 1680, 131 L.Ed.2d 695 (1995), citing *Greater Washington*, 506 U.S. at 130 n. 1, 113 S.Ct. at 583 n. 1.

We begin by considering whether the SBT falls within the *Shaw* exception for state laws that have only a "tenuous, remote or peripheral" effect on a plan covered by ERISA. In *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir.1987), we considered whether a statute that, like Michigan's SBT, used ERISA plan contributions to

calculate the tax base, had more than a tenuous, remote, or peripheral effect on a covered plan. The municipal income tax at issue in *Firestone* imposed a two percent tax on income from work done within Akron, Ohio, and it defined income to include amounts employees contributed to health and savings plans covered by ERISA.[2] In holding that Akron's income tax was not pre-empted, we considered three factors: whether the tax constituted a traditional exercise of state authority; whether it affected relations among the principal ERISA entities--the employer, the plan, the plan fiduciaries, and the beneficiaries--or relations between one of these entities and an outside party; and whether it had any more than a tenuous or peripheral effect on a covered plan. *Firestone*, 810 F.2d at 555-56.

Applying the *Firestone* factors to the Michigan SBT, we find that the SBT has, at most, a tenuous, remote, or peripheral effect on an ERISA plan. First, the Michigan SBT falls within an area of traditional state regulation. Although as we noted in *Firestone*, a state law's status as a tax is not dispositive on the issue of whether the law escapes pre-emption, *see id.* at 555-56, we are mindful that federal courts must give due respect to "the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment in*

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[2] The plan at issue allowed employees to divert up to seventeen percent of income each pay period into any or all of three separate investment funds; it also allowed employees to divert up to $200.00 per month for medical expenses not covered by insurance. *Firestone*, 810 F.2d at 551-52.

Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 103, 102 S.Ct. 177, 179, 70 L.Ed.2d 271 (1981).

Second, the tax does not affect relations among the principal ERISA entities. The SBT applies to all employers doing business in Michigan whether or not they contribute to ERISA plans. Indeed, the SBT applies to health and pension plans that are not covered by ERISA, as well as those that are covered by ERISA. Thus it is not specifically designed to affect ERISA plans themselves. The SBT affects only the relationship between the employer and the state, not the relationship between the plan and the employer and employees.

Finally, the SBT has only a peripheral effect on an ERISA plan. On this point, it is important to remember that the Supreme Court does not require that state laws have absolutely zero effect on ERISA plans, for this likely would be impossible as a matter of logic or practicality. State property, contract, and tort law all surely have some effect on ERISA plans, but they are not pre-empted. Moreover, the Supreme Court has recognized that state laws of general applicability can have effects on ERISA plans and still escape pre-emption. In *Mackey*, the Court rejected a pre-emption challenge to a state garnishment statute even though

> [c]ompliance with the state garnishment procedures subjects the plan to significant administrative burdens and costs. Petitioners are required to confirm the identity of each of the 23 plan participants who owe money to respondent, calculate the participant's maximum entitlement from the fund for the period between

> the service date and the reply date of the summons of garnishment, determine the amount that each participant owes to respondent, and make payments into state court of the lesser of the amount owed to respondent and the participant's entitlement. Petitioners must also make decisions concerning the validity and priority of garnishments and, if necessary, bear the costs of litigating these issues. Further, as trustees of a multiemployer plan covering participants in several States, petitioners are potentially subject to multiple garnishment orders under varying or conflicting state laws.

Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 842, 108 S.Ct. 2182, 2192, 100 L.Ed.2d 836 (1988) (Kennedy, J., dissenting); *see also New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, ___, 115 S.Ct. 1671, 1680, 131 L.Ed.2d 695 (1995) (noting that because the Court in *Mack y* had held that "a law authorizing an indirect source of administrative cost [on ERISA plans] is not pre-empted, it should follow that a law operating as an indirect source of merely economic influence on administrative decisions, as here, should not suffice to trigger pre-emption either."). Thus a state law of general applicability can have a slight effect on an ERISA plan and still not be pre-empted.

As Judge Hillman's opinion in *Thiokol*, 94-1903, explains in considerable detail, Michigan's SBT is a tax on value added that simply uses an employee's compensation in its calculation of value added. Michigan wrote its value added tax using an addition method of calculating value added. Such a method sums the total of all compensation to employees, officers, directors, plus all fringe benefits, worker's compensation and all the expenses

related to personnel, interest payments, profit, and depreciation. Michigan drafted its value added tax using the addition method because taxpayers calculate compensation by making relatively easy adjustments to federal income tax figures. Indeed, Michigan chose the addition method rather than the subtraction method, which is common in European countries, because the addition method entails easier calculations for taxpayers.

Michigan could have written its value added tax using the subtraction method, under which firms would subtract the cost of materials from revenues. Had it done so, the tax would not require any reference to health or pension plans, for it would avoid the use of compensation as a component in arriving at the tax base. Because, as Judge Hillman noted, the result for taxpayers is the same regardless of which way the value added tax is written,[3] the additive method of computing value added

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[3] The numerical example cited in Judge Hillman's opinion illustrates graphically how the two methods are interchangeable:

> A simple example makes it clear that the method of calculation does not change the nature of or amount of the tax. Assume, again, that a baker's sole revenue comes from the production of bread. Before the baker produces the bread, however, the farmer grows the wheat and the miller grinds it into flour. For ease of calculation, a value-added tax of ten percent is imposed at all stages of production. As the following table illustrates, under any of the calculation methods, the nature of and the amount of the tax remains [sic] the same. In each case, subtraction,

taxes does not truly tax the individual components that go into the calculation of value added. Michigan would achieve the same results by simply defining compensation as all expenditures on behalf of employees, officers

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addition or credit, the tax liability is the same for the farmer, miller and baker. In addition, the total tax liability is the same. Further, the total tax liability is the same if the entire tax is collected only at the final, retail sale.

Basic Transactions

	Farmer	Miller	Baker	Total
Sales	300	700	1,000	2,000
Material	0	300	700	1,000
Wages, Interest, Depreciation	200	200	200	600
Profit	100	200	100	400
Value Added	300	400	300	1,000

Subtraction-Method VAT (Sales--Materials)

Sales	300	700	1,000	2,000
Material	0	300	700	1,000
Value Added	300	400	300	1,000
VAT Liability	30	40	30	100

Addition-Method VAT (Wages, etc. + Profit)

Wages, etc.	200	200	200	600
Profit	100	200	100	400
Value Added	300	400	300	1,000
VAT Liability	30	40	30	100

Credit-Method VAT (Tax on Sales--Credit)

Sales	300	700	1,000	2,000
Tax on Sales	30	70	100	200
Credit	0	30	70	100
VAT Liability	30	40	30	100

and directors or by replacing its addition method with a subtraction method of calculating a value added tax base. Paying proper heed to the Supreme Court's admonition that in tax matters courts should consider "substance, not . . . form," *see Diedrich v. Commissioner of Internal Revenue*, 457 U.S. 191, 195, 102 S.Ct. 2414, 2417-18, 72 L.Ed.2d 777 (1982), it would appear that Michigan's SBT fits with the *Shaw* exception and is not pre-empted by § 514(a).

III

Thiokol and AKZO argue that even if the SBT has only a tenuous, remote, or peripheral effect on a covered plan, it is still pre-empted because it refers to employee benefit plans, some of which are covered by ERISA. They argue that *District of Columbia v. Greater Wash. Bd. of Trade*,

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Retail Sales Tax

Retail Sales	0	0	1,000	1,000
Tax	0	0	100	100

Thiokol v. Roberts, 858 F.Supp. 674, 678 (W.D.Mich.1994).

As Judge Hillman's example indicates, value added taxes can be written in different ways, each of which produces the same tax liability. Thus, Michigan's SBT, which follows the addition method and includes within the definition of wages all payments made to health and pension plans, does not truly "tax" such payments; for the statute could be rewritten in a manner that would achieve the exact same result without relying on a compensation component.

506 U.S. 125, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992), restricted the *Shaw* exception. Thiokol and AKZO point to language in *Greater Washington* that they claim supports their view that the pre-emption exception for tenuous effect only applies to state laws that have "a connection with" an ERISA plan; thus, they claim, it no longer applies to those that actually "refer to" such a plan.

In *Greater Washington*, after discussing *Shaw* and other cases defining "relates to," the Court stated:

> "Section 2(c)2 of the District's Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA and *on that basis alone* is pre-empted."

Greater Washington, 506 U.S. at 130, 113 S.Ct. at 583 (emphasis added). Thiokol and AKZO argue that by using the words "on that basis alone," the Court was announcing a new test under which mere reference in a statute is enough to pre-empt it; that once the law refers to an ERISA plan, it is *ipso facto* pre-empted. In granting AKZO's motion for summary judgment, Judge Bell accepted this position. While acknowledging that footnote one in *Greater Washington* had preserved the *Shaw* exception,[4] Judge Bell concluded that by using the language "connection with," while omitting "refers to," the

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[4] The Court preserved the *Shaw* exception in the following language:

> Preemption does not occur, however, if the state law has only a "tenuous, remote, or peripheral" *connection with* covered plans.

Greater Washington, 506 U.S. at 130 n. 1, 113 S.Ct. at 583 n. 1 (emphasis added).

Supreme Court was indicating that courts should consider whether a statute fits within the *Shaw* exception only when the state law has a "connection with" an ERISA plan, but not when the law actually refers to such plans. Finally, Thiokol and AKZO point to Justice Stevens's dissent in *Greater Washington*, which, they claim, apprised the majority of the broad scope of its holding.

We consider in turn each of the justifications for limiting the *Shaw* exception to "connection with" cases. Ultimately, we conclude that *Greater Washington* does not limit the *Shaw* exception to such cases. Congress sought to pre-empt state laws that have a burdensome *effect* on ERISA plans. When a state law has such an effect on a covered plan, it is pre-empted; when it does not, it is not pre-empted even if it actually refers to ERISA. Interpreting "relates to" as being concerned with state laws' significant effects on covered plans serves Congress's purpose in enacting ERISA, *viz.* to avoid encouraging "employers with existing plans to reduce benefits, [or] those without such plans to refrain from adopting them." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11, 107 S.Ct. 2211, 2217, 96 L.Ed.2d 1 (1987).

A

We first consider the significance to attach to the use of the phrase "on this basis alone" in *Greater Washington*. Was the Court, as Thiokol and AKZO argue, announcing a new rule in which the exception is applicable only to statutes that have a mere connection with a covered plan but not to those that actually refer to covered plans?

Thiokol and AKZO's argument attaches undue significance to the Supreme Court's omission of an analysis as to whether the Shaw exception applied to the facts in *Greater Washington*.[5] Even though the Court wrote that the Equity Amendment was pre-empted "on this basis alone," the Court had already found that the law would have a significant impact on an ERISA plan:

> By tying the benefit levels of the workers' compensation plan to those provided in an ERISA-covered plan, "the Equity Amendment Act could have a serious impact on the administration and content of the ERISA-covered plan."

506 U.S. at 129, 113 S.Ct. at 583, *quoting Greater Wash. Bd. of Trade v. District of Columbia*, 948 F.2d 1317, 1325 (D.C.Cir.1991). Since the Shaw exception did not apply in *Greater Washington*, we should not infer that the Supreme Court was announcing a new rule denying the applicability of this exception to state laws that refer in a remote or peripheral way to covered plans but otherwise have no effect on such plans. We suggest that only if the exception *could* apply to the facts before the Court would

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[5] *Greater Washington* retains the *Shaw* exception in a footnote. 506 U.S. at 130 n. 1, 113 S.Ct. at 583 n. 1. The Court places the footnote citing the exception immediately before the sentence that contains the statement: "Section 2(c)(2) . . . specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted." *Id.*, at 130, 113 S.Ct. at 583. After noting that "on that basis alone" it is preempted, the Supreme Court does not consider whether the exception applies. Thus Thiokol and AKZO argue that "on that basis alone" means that mere reference, irrespective of any effect the state law might have on a covered plan, requires pre-emption.

the omission of an analysis of the exception's applicability to instances where the reference is remote, peripheral or tenuous amount to a rejection of its validity in those cases. Moreover, such a *per se* pre-emption rule stands in sharp contrast to past ERISA cases, none of which find pre-emption on the basis of the state law's mere reference to a covered plan. Indeed, when reviewing the vast body of ERISA pre-emption decisions, Judge Hillman found that in those cases striking down state laws because they referred to a covered plan, all involved state laws that had a clearly significant *effect* on such plans. *Thiokol Corp. v. Roberts*, 858 F.Supp. 674, 683 (W.D.Mich.1994). Consequently, we do not believe the Supreme Court's use of the words "on this basis alone" in *Greater Washington* by themselves limit the *Shaw* exception.

B

Second, we consider whether the Supreme Court's statement of the *Shaw* exception in *Greater Washington* evinces a new rule limiting the exception to "connection with" cases. *Shaw* itself speaks of pre-emption analysis in terms of the state law's effect on the covered plan: "Some state actions may *affect* employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901 n. 21, 77 L.Ed.2d 490 (1983) (emphasis added). *Greater Washington* describes the Shaw exception differently: "Pre-emption does not occur, however, if the state law has only a 'tenuous, remote, or peripheral' *connection with* covered plans. . . . " 506 U.S. at 130 n. 1, 113 S.Ct. at 583 n.

1 (emphasis added), citing *Shaw*, 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 n. 21. In *Akzo*, Judge Bell found that the Supreme Court chose the words "connection with" because it wanted to limit the *Shaw* exception to "connection with" cases, thereby excluding its application from "refer to" cases: *Akzo America, Inc. v. Revenue Div., Dep't of the Treasury*, No. 4:93-CV-101, 1995 WL 44043 at *2 (W.D.Mich. Jan.13, 1995).

We are not persuaded that this footnote in *Greater Washington* limited the *Shaw* exception. First, although the Supreme Court's ERISA pre-emption cases may be read as treating "refer to" and "connection with" cases as analytically distinct, *see, e.g., New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, ___, 115 S.Ct. 1671, 1677, 131 L.Ed.2d 695 (1995), and thus it could be argued that the Supreme Court was aware of the possible legal significance of using only the words "connection to," we do not believe the Court would take this significant step without discussion and in a case where it had found effect.

The Supreme Court easily could have effected such a significant change in ERISA pre-emption law simply by writing what Thiokol and AKZO interpret it as having written: "when a state law refers to a covered plan, it is pre-empted even if it has only a tenuous, remote, or peripheral effect on such plans." But the Court did not use such language. As we attempt to discern the Court's meaning in *Greater Washington*, we are mindful that the underlying case involves a state's vital need to secure revenue for its most basic operations. Denying the *Shaw* exception's applicability to statutes, like Michigan's SBT, that refer to ERISA but have only a tenuous, remote, or

peripheral effect on covered plans would entail so profound a change in ERISA pre-emption law that we believe the Supreme Court would have clearly articulated such a new rule.

Second, the argument that *Greater Washington's* mention of "connection with" constituted an express rejection of the applicability of the *Shaw* exception to "refer to" cases formalistically places "refer to" and "connection with" into separate and independent categories when both are simply approximations of the same test. Although in its ERISA pre-emption cases the Supreme Court analyzes state laws by first examining whether they refer to a covered plan and, if not, whether they still have some connection with a covered plan, the two categories are not analytically distinct: rather, they are two related methods of determining the fundamental question in ERISA analysis: whether the state law has an impermissible *effect* on a covered plan.

The Supreme Court has noted that in enacting ERISA's pre-emption provision, § 514(a), Congress intended

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law: *the goal was to minimize the administrative and financial burden* of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

New York Blue Cross, ___ U.S. at ___, 115 S.Ct. at 1677 (emphasis added), quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 484-85, 112 L.Ed.2d 474 (1990). Thus Congress sought to minimize the burdensome effects state laws might have on ERISA plans. In the form of § 514(a), Congress sought to protect plans from the effects of state laws by superseding all state laws that "relate to" covered plans.

The Supreme Court's definition of "relates to" in *Shaw*--"A law 'relates, to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." 463 U.S. at 96-97, 103 S.Ct. at 2900--furthers Congress's intent to protect covered plans from the effects of state law. If "relates to" were defined to include only those state laws that specifically referred to covered plans, it would leave untouched many statutes that do not specifically refer to ERISA plans but still have a very significant effect on such plans. Such a rule would reward clever legislative drafters, who could undermine Congress's effort to protect covered plans from the effects of state laws by deleting the forbidden words and retaining the significant effects.

More importantly, the Court's definition of "relates to" as having a "connection with or reference to" sheds light on the purpose of including "reference to." When the Court strikes down a statute that "refers to" ERISA or a covered plan, it does so not because of the reference *per se;* it does so because that reference has a legal *effect*. Thus if the nature of ERISA pre-emption was state laws' impermissible "references to" ERISA, the Supreme Court would not have needed to include in the definition of "relates to" those laws that have a "connection with"

ERISA plans. Consequently, the broadened definition reflects the Court's conclusion that Congress' concern was with state laws that have an effect on ERISA plans.

Granted, most state statutes that "refer to" ERISA plans do have an effect, for that would ordinarily be the intent of the drafters when they made such a reference. But some statutes that refer to covered plans do not have an effect on covered plans, and others have only a tenuous, remote, or peripheral effect. Both of these types of state laws fall outside the scope of ERISA pre-emption. Other statutes do not refer to ERISA but nonetheless have an effect on a covered plan; these are pre-empted because they have more than a tenuous, remote, or peripheral effect. What unites the "refers to" and "connection with" definitions of "relates to" then is that both were crafted to get at statutes that have an effect on ERISA plans. Consequently, statutes that refer to ERISA, but have no effect on a covered plan, are not within the scope of the definition of relates to and, as such, are not pre-empted.

We find further support for our belief that "refer to" cases relate to ERISA plans because of their effect, not their reference, in *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), a case the Supreme Court cited in its most recent ERISA pre-emption case. *See New York Blue Cross*, ___ U.S. at ___, 115 S.Ct. at 1680. In *Mackey*, the Court set forth its view of the purpose behind the "refers to" branch:

> On several occasions since our decision in *Shaw*, we have reaffirmed this rule [that a law relates to a plan if it has a connection with or reference to such a plan], concluding that state laws which make "reference to" ERISA plans are laws that

> "relate to" those plans within the meaning of § 514(a). In fact, we have virtually taken it for granted that state laws which are "specifically designed to affect employee benefit plans" are pre-empted under § 514(a).

Mackey, 486 U.S. at 829, 108 S.Ct. at 2185 (citations omitted). In this passage, the second sentence sheds light on the first: the Court views "refers to" cases as those in which the state legislature passed a statute "specifically designed to affect" a covered plan. Thus statutes that refer to ERISA plans are struck down not because of the reference but because of their intended effect. Moreover, by noting that "it has virtually taken it for granted," the Court in effect indicates that there is no *per se* rule: by noting that a statute that is specifically designed to affect an ERISA plan is almost always pre-empted, it is acknowledging that there may be situations in which a statute with that goal still might not be pre-empted. If there may be some statutes whose drafters intend to specifically affect ERISA plans but which are still not pre-empted, then *a fortiori* a statute that refers to a covered plan but does not attempt to affect such a plan should not be pre-empted.

Consequently, we are not persuaded that the Supreme Court's treatment of *Shaw* in *Greater Washington* evinces its intent to limit the *Shaw* exception to "connection with" cases. Such a reading ignores the underlying purpose of ERISA pre-emption, which is to prevent impermissible effects, not references.

C

Finally, we must consider whether the majority inferentially adopted what Justice Stevens's dissent in *Greater Washington* described to be the far reaches of the holding:

> If I understand the Court's reasoning today, a state statute that merely announced that basic rule of damages law [that employees who lose their job by reason of wrongful discharge or negligent infliction of physical injury may recover damages for the entire loss of earnings, including the loss of fringe benefits like health insurance] would be preempted by ERISA if it "specifically refers" to each component of the damages calculation.

506 U.S. at 133-34, 113 S.Ct. at 585 (Stevens, J., dissenting); *see also id.* at 137-38, 113 S.Ct. at 587 (Stevens, J., dissenting) ("In my opinion, a State law's mere reference to an ERISA plan is an insufficient reason for concluding that it is preempted. . . . "). Were we to accept Justice Stevens's reading of the majority opinion, reference alone, despite the absence of any effect, would be enough to warrant pre-emption. We acknowledge that the majority took no steps to convince Justice Stevens that his interpretation was incorrect or otherwise engage his dissent, unless the *Shaw* footnote can be considered a response.

Nevertheless, we decline to in effect adopt Justice Stevens's interpretation of the majority opinion. A *per se* rule for pre-emption based on mere reference would effect such a huge change in ERISA pre-emption doctrine, and have such a massive and indiscriminate impact on state laws throughout the nation, that in the interest of

federalism we would expect a clearer statement from the Court before embarking on this path. In *Thiokol*, Judge Hillman found 432 state laws that use the words ERISA or Employee Retirement Income Security Act; as he noted, many more contain language describing pension or health benefit plans that "refer to" ERISA without using the word ERISA. If mere reference alone, without any impermissible effect on a covered plan, is enough to pre-empt a state law, then all these laws are pre-empted. Such a rule would lead to patently absurd results. As the Third Circuit noted, such a rule would mean that a state law providing that "No employer, including an ERISA plan, shall discriminate on the basis of race or gender" would be pre-empted. *See United Wire, Metal and Machine Health and Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1192 n. 6 (3rd Cir.1993). A final example suffices to show that there must necessarily be an analysis of a state law's effect and that mere reference is not enough: under a *per se* reference test that did not concern itself with whether a law had only a tenuous, remote, or peripheral effect or even had no effect, ERISA would pre-empt a non-binding resolution passed by a town board declaring February 1996 as "ERISA Awareness Month." Surely Congress did not intend such a broad and unreasonable pre-emption doctrine.

We believe that a reading of "relates to" which totally obviates the need to examine the effect of state laws that refer to a covered plan misconstrues Congress's intent. If the Supreme Court nevertheless intended to so interpret "relates to," it would do so expressly. It would use language like that which appeared in footnote thirteen of the D.C. Circuit's *Greater Washington* opinion:

> We agree with the Fifth Circuit that the "*Shaw* 'exception'—that ERISA does not preempt state laws which affect benefit plans in a tenuous or peripheral manner—applies only to laws of general application; it does not protect state laws which specifically refer to ERISA benefit plans."

Greater Wash. Bd. of Trade v. District of Columbia, 948 F.2d 1317, 1322 n. 13 (D.C.Cir.1991), *aff'd*, 506 U.S. 125, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992), quoting *In re Dyke*, 943 F.2d 1435, 1448 (5th Cir.1991). Yet instead of adopting this narrow interpretation when it had the appeal of the D.C. Circuit's *Greater Washington* opinion before it on review, the Supreme Court restated its holding that "Pre-emption does not occur, however, if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans. . . . " *Greater Washington*, 506 U.S. at 130, 113 S.Ct. at 583.

Put simply, if the Supreme Court intends to abandon an analysis based on effect, we believe it will do so in affirmative terms rather than remaining silent in the face of a dissent. *Cf. First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, ___, 115 S.Ct. 1920, 1925, 131 L.Ed.2d 985 (1995) ("[O]ne can understand why courts might hesitate to interpret silence or ambiguity. . . . ").

IV

Next we turn to 95-1171, AKZO's challenge to Mich.Comp.Laws Ann. § 205.27a(6) (West Supp.1995), which requires taxpayers seeking tax refunds on the grounds that the state tax law violates the federal constitution to file such claims within 90 days after the date set

for filing a return. AKZO argues that § 205.27a(6) is pre-empted by ERISA and that it violates due process and equal protection. We find that ERISA does not pre-empt this statute of limitation.

Because § 205.27a(6) makes no specific reference to an ERISA plan, we must consider whether it has any connection with a plan that has more than a tenuous, remote, or peripheral effect. The Supreme Court's holding in *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) controls. *Mackey* held that ERISA does not pre-empt a state law allowing garnishment of ERISA plans. *Id.* at 841, 108 S.Ct. at 2191 ("ERISA does not forbid garnishment of an ERISA welfare benefit plan, even where the purpose is to collect judgments against plan participants."). Here, the statute of limitations applies to all types of tax challenges based on federal law or the federal constitution. Like the garnishment statute in *Mackey*, the statute of limitations is likely to have some effect on ERISA-based challenges to Michigan tax laws. But any effect will be at most remote or peripheral. Thus, we find that § 205.27a(6) is not pre-empted by ERISA.

The District Court went on to hold that § 205.27a(6) does not violate the federal constitutional guarantees of due process and equal protection.[6] The Court erred in

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[6] In an unpublished disposition, Judge Hillman upheld a Magistrate's order denying Thiokol's motion to amend its complaint a third time with respect to claims that this statute of limitations was pre-empted by ERISA and violates due process and equal protection. The Court was correct to deny Thiokol's motion to include the constitutional claims, for Courts may

reaching this issue, for it lacked jurisdiction to consider a declaratory judgment action in which the relief requested would have necessitated striking down a state statute for violating the United States Constitution. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 103, 102 S.Ct. 177, 179-80, 70 L.Ed.2d 271 (1981), citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). Such relief must be sought in Michigan courts. *See* 28 U.S.C. § 1341.

V

For the reasons stated above, we **REVERSE** and **REMAND** in 95-1116 the District Court's grant of summary judgment in favor of AKZO on the grounds that Michigan's Single Business Tax is pre-empted. Likewise, we **AFFIRM** in 94-1903 the District Court's grant of summary judgment finding that ERISA does not pre-empt Michigan's Single Business Tax.

We **AFFIRM,** in 95-1171, that Court's holding that Michigan's 90-day statute of limitations for constitutional challenges to its tax laws is not pre-empted by ERISA. But we **REVERSE** its holding that the statute of limitation

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deny motions to amend where the amended complaint would not survive a motion to dismiss: because federal courts lack jurisdiction to grant declaratory relief striking down state tax laws as unconstitutional, an amendment to the complaint including constitutional challenges would not have survived a motion to dismiss for lack of jurisdiction. However, the District Court erred in denying Thiokol's motion to add its claim that the statute of limitations was pre-empted by ERISA. In view of our holding that the statute of limitations is not pre-empted, however, there is no necessity for a remand on that issue.

survives due process and equal protection challenges, for it lacked jurisdiction to decide those issues.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AKZO AMERICA, INC. a Delaware corporation, et al.,

Plaintiffs,

v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN; DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan; and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,

Defendants.
_____/

Case No. 4:93-CV-101

HON. ROBERT HOLMES BELL

JUDGMENT

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' motion for summary judgment (docket # 14) is **GRANTED IN PART** and **DENIED IN PART**;

IT IS FURTHER ORDERED AND ADJUDGED that summary judgment is **GRANTED** for Defendants with regard to Plaintiffs' second and third counts;

IT IS HEREBY DECLARED that, with regard to Plaintiffs' first count, Section 514 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144, preempts MICH. COMP. LAWS § 208.4(3) to the extent that it includes within the meaning of "compensation" payments to ERISA plans;

IT IS FURTHER ORDERED AND ADJUDGED that **JUDGMENT** be entered for Defendants with respect to Plaintiffs' second and third counts.

Dated: January 13, 1995 /s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
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SOUTHERN DIVISION

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Defendants.
_____/

Case No. 4:93-CV-101

HON. ROBERT HOLMES BELL

OPINION

This case presents the question whether Section 514 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144, preempts that part of Michigan's Single Business Tax Act (SBTA) which requires Plaintiffs to include within their adjusted tax bases contributions made to ERISA plans. Before the Court at this time is Plaintiffs' motion for summary judgment.

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R.

Civ. P. 56(c). In the instant case, the question before the Court is a purely legal one for which summary judgment is appropriate. Moreover, although Defendants have not filed a cross-motion for summary judgment with regard to Plaintiffs' claims, in appropriate circumstances the Court may independently raise and grant a summary judgment motion in favor of the nonmoving party. *See Coach Leatherware Co. v. Ann Taylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991); *McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991); *Dayton Elec. Mfg. Co. v. Apcom, Inc.*, 782 F.Supp. 389, 394-95 (N.D. Ill. 1992). *See generally* 6 Moore's Federal Practice, ¶ 56.12, p. 56-162.

This case is similar in nature to the recently-decided case of *Thiokol Corp. v. Roberts*, 858 F. Supp. 674 (W.D. Mich. 1994). In *Thiokol*, the Honorable Douglas W. Hillman considered the very question of the instant case and concluded that Michigan's Single Business Tax (SBT) is not preempted by ERISA. *Id.* at 684. Although the Court finds *Thiokol* to be a well-reasoned and carefully-decided opinion, this Court can not agree with one aspect of the *Thiokol* analysis.[1] Based upon this singular point, the

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[1] In summarizing his conclusions in *Thiokol*, Judge Hillman wrote:

After a thorough review, I conclude that the Michigan SBT is not preempted by ERISA. This conclusion is based on the following facts.

(1) The SBT is a neutral tax of general application which does not single out ERISA plans for special treatment nor predicate rights or obligations on the existence of such plans.

Court concludes that ERISA does preempt the portion of the SBT at issue in this case.

I

With limited exceptions not applicable in this case, Section 514 of ERISA provides that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). The Supreme Court has indicated that the phrase "relate to" is to be understood in its broad sense. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-97. Accordingly, the question of whether a state law relates to an ERISA plan is answered in the affirmative in two situations: (1) where

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(2) The SBT does not regulate ERISA plans.

(3) The SBT does not affect ERISA plans or the relationships between, or among, ERISA entities.

(4) The SBT is neither a direct nor indirect tax on employer contributions to ERISA plans. The SBT is a value added tax, akin to a sales tax, which merely does not allow a deduction for ERISA contributions made by an employer.

(5) Any minimal effect the SBT may have on employer contributions to ERISA plans is incidental and unavoidable; such an effect could be found in nearly every state law which regulates business. This incidental effect is tenuous, remote and peripheral.

(6) I have found no case that has held a state law "relates to" and is preempted by ERISA merely because it refers to ERISA. Likewise, I decline to so hold.

Id. at 683-84. The Court agrees with all of the *Thiokol* findings except for the sixth.

the state law has a connection with an ERISA plan; and (2) where the state law refers to an ERISA plan. The Supreme Court has established an exception to this rubric for state laws which "affect employee benefit plans in too tenuous, remote, or peripheral a manner. . . . " *Id.* at 100 n.21; *see also District of Columbia v. The Greater Washington Bd. of Trade*, 506 U.S. ___, 121 L. Ed. 2d 513, 520 n.1 (1992); *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 842 (1986) (Kennedy, J., dissenting). It is the precise scope of this exception which is the issue upon which this case turns.

The "tenuous, remote, or peripheral" exception has its genesis in *Shaw*. In a footnote in *Shaw*, the Supreme Court indicated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law '*relates to*' the plan." *Shaw*, 463 U.S. at 100 n.21 (emphasis added). While *Shaw* established the existence of the exception, it did not have opportunity to develop the precise scope of it: "The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line." *Id.*

Defendants argue that *Shaw* establishes that the "tenuous, remote, or peripheral" exception applies to any state law which relates to an ERISA plan regardless of whether it relates to the plan as a result of its connection with the plan or its reference to the plan. While the dictum of *Shaw* may be read this broadly, it appears that the Supreme Court has implicitly and explicitly rejected this argument in *Greater Washington*.

In *Greater Washington*, the Court held that the District's provision, which specifically referred to ERISA plans, was preempted "on that basis alone." *Greater Washington*, 121 L. Ed. 2d at 520. Significantly, the Court did not proceed to consider whether the "tenuous, remote, or peripheral" exception applied to the District's provision. The implication of this is that the exception does not apply when a state law relates to an ERISA plan by virtue of its reference to the plan.

Stronger evidence still of the Supreme Court's limiting of the "tenuous, remote, or peripheral" exception to the "connection with" situation is the statement in *Greater Washington* that "[p]re-emption does not occur, however, if the state law has only a 'tenuous, remote, or peripheral' *connection with* covered plans. . . . " *Id.* at 520 n.1 (emphasis added). Accordingly, *Greater Washington* limits the scope of the "tenuous, remote, or peripheral" exception to "connection with" situations by its failure to consider the exception with regard to a "reference to" situation, as well as by its express limitation of it to "connection with" situations.

II

The Michigan SBT is a value-added tax, as opposed to an income tax, which the State of Michigan imposes upon the privilege of doing business in the state. MICH. COMP. LAWS § 208.31(3). The tax is levied at a rate of 2.35% of a person's adjusted tax base. *Id.* § 208.31(1). A person's tax base is that person's "business income" subject to enumerated adjustments. *Id.* § 208.9(1). One such

adjustment requires the addition of "compensation." *Id.* § 208.9(5). The term "compensation" means:

> all wages, salaries, fees, bonuses, commissions, or other payments. . . . *Compensation includes* . . . payments to state and federal unemployment compensation funds, payments under the federal insurance contribution act and similar social insurance programs, payments, including self-insurance, for workmen's compensation insurance, payments to individuals not currently working, payments to dependents and heirs of individuals because of current or former labor services rendered by those individuals, *payments to a pension, retirement, or profit-sharing plan,* and payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans and payments of fees for the administration of health and welfare and noninsured benefit plans.

Id. § 208.4(3) (emphasis added).

Since the "tenuous, remote, or peripheral" exception does not apply to a state law which refers to an ERISA plan, it is of no effect, in this Court's estimation, that the SBT has merely a tenuous, remote, or peripheral effect on ERISA plans. Neither is it of any effect that the Single Business Tax Act could be rewritten, utilizing another method to calculate the tax base, whereby the SBT would not make reference to ERISA plans.[2] Rather, since

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[2] This is not the situation referred to in *United Wire, Metal & Mach. Health and Welfare Fund v. Morristown Mem. Hosp.*, 995 F.2d 1179 (3d Cir. 1993). In that case the court wrote that "[w]here, as

§ 208.4(3) specifically refers to plans regulated by ERISA, it is, "on that basis alone", pre-empted. *See Greater Washington*, 121 L. Ed. 2d at 520. Accordingly, the Court concludes that ERISA preempts § 208.4(3) to the extent that it includes within the meaning of "compensation" payments to ERISA plans. *Cf. id.* at 521 n.3.

III

Plaintiffs' [sic] have also attacked the statute of limitations for a refund claim based upon the invalidity of § 208.4(3) as it applies to payments to ERISA plans. The limitations provision in question provides an exception to the general limitations period of four years for refund claims:

> Notwithstanding the provisions of subsection (2), a claim for refund based upon the validity of a tax law based on the laws or constitution of the United States or the state constitution of 1963 shall not be paid unless the claim is filed within 90 days after the date set for filing a return.

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here, a reference to an ERISA plan can be excised without altering the legal effect of a statute in any way, we believe the reference should be regarded as without legal consequence for § 514(a) purposes." *Id.* at 1192 n.6. The excising of the reference to ERISA plans in the instant case would alter the meaning of "compensation", thereby altering the legal effect of the SBTA. To the extent that *United Wire* holds that mere reference to an ERISA plan is insufficient to find that a law relates to the plan unless the law is specifically designed to affect the plan, *see id.* at 1192, the Court concludes that *United Wire* is at odds with *Greater Washington*.

MICH. COMP. LAWS § 205.27a(6). Plaintiffs argue that this provision is invalid in that it is preempted by Section 514 of ERISA and is unconstitutional under the Due Process and Equal Protection Clauses.

Unlike § 208.4(3) which specifically refers to an ERISA plan, § 205.27a(6) does not make reference to an ERISA plan, and is not, therefore, preempted on that basis. Nor is it preempted by virtue of its connection with an ERISA plan, since, at most, it has only a tenuous, remote, or peripheral connection with a covered plan.

Neither is § 205.27a(6) invalid on a constitutional ground. With regard to Plaintiffs' due process challenge, the Court concludes that the provision is not unreasonably short so as to deprive Plaintiffs of due process of law. Rather, the State of Michigan has a rational basis for its selection of an abbreviated limitations period:

> When courts rule on constitutional grounds, portions if not entire tax schemes are placed in jeopardy. The fall-out from such rulings can be unbearable--the taxpayer wins, plus *all* other similarly situated taxpayers. The financial reprecussions [sic] on the state treasury can be devastating. .

Defs.'s Br. in Support of Mot. for Summ. J. 24. Similarly, with regard to the equal protection challenge, this same reason provides a rational basis for the classification drawn by the nature of the claim.

IV

In summary, therefore, the Court concludes that Section 514 of ERISA preempts MICH. COMP. LAWS

§ 208.4(3) to the extent that it includes within the meaning of "compensation" payments to ERISA plans. However, Section 514 does not preempt MICH. COMP. LAWS § 205.27a(6), nor is that provision invalid on federal constitutional grounds.

An order consistent with this opinion will be entered.

Dated: January 13, 1995 /s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

THIOKOL CORP., Morton International, Inc. (as successors through corporate reorganization to Morton Thiokol, Inc.) and Bee Chemical Company, Plaintiffs,

v.

Douglas B. ROBERTS, in his official capacity as Treasurer of the State of Michigan, and Thomas M. Hoatlin, in his official capacity as Commissioner of Revenue of the State of Michigan, Defendants.

No. 4:90-CV-12.

United States District Court,
W.D. Michigan,
Southern Division.

July 22, 1994.

Suit challenging state value added tax as preempted by Employee Retirement Income Security Act (ERISA) was remanded following appeal by the Court of Appeals, 987 F.2d 376, Kennedy, J. Cross-motions for summary judgment were made following remand. The District Court, Hillman, Senior District Judge, ruled that Michigan Single Business Act was not preempted by ERISA.

Summary judgment for state.

James H. Geary, Howard & Howard, P.C., Kalamazoo, MI, Patrick R. Van Tiflin, Howard & Howard, Lansing, MI, for plaintiffs.

Richard R. Roesch, Russell E. Prins, Asst. Atty. Gen., Frank J. Kelley, Atty. Gen., Revenue Div., Steven D. Hughey, Daniel Mark Greenberg, Asst. Attys. Gen., Lansing, MI, Dept. of Treasury, State of Mich., Revenue Div.

Russell E. Prins, Steven D. Hughey, Daniel Mark Greenberg, Asst. Attys. Gen., Lansing, MI, for Robert A. Bowman, Treasurer of the State of Mich. and Melvin Vanvorst.

OPINION RE CROSS MOTIONS FOR SUMMARY JUDGMENT

HILLMAN, Senior District Judge.

Plaintiffs, Thiokol Corporation, Morton International, Inc., and Bee Chemical Company are corporations engaged in business in Michigan. Each plaintiff is subject to the Michigan Single Business Tax (SBT), M.C.L. §§ 208.1-.145. Plaintiffs allege that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, preempts Michigan's SBT. Defendants are Douglas B. Roberts (Treasurer of the State of Michigan) and Thomas M. Hoatlin (Commissioner of Revenue of the State of Michigan).

BACKGROUND

1. *The Michigan Single Business Tax*

The State of Michigan taxes business activity within the state through the Michigan Single Business Tax (SBT), M.C.L. §§ 208.1-.145. The SBT is imposed on all businesses for the privilege of engaging in business within Michigan. This tax is levied at the rate of 2.35 percent of an adjusted tax base.

Most states tax either business income or sales. The SBT, however, taxes neither business income nor sales, but rather the value a business adds to a product ("value

added"). The value added tax base is defined as, "the difference between the value of the product at sale and the cost of goods purchased from other businesses that went into the product." Taxation and Economic Policy Office, Michigan Department of Treasury, Analysis of the Michigan Single Business Tax, 20 (1985).

In Michigan the value added tax base is calculated by summing compensation, depreciation, interest and profits. Further, the compensation component of this calculation specifically includes, "payments to a pension, retirement, or profit sharing plan, and payments for insurance for which employees are the beneficiaries, including payments under health and welfare noninsured benefit plans and payments of fees for administration of health and welfare and noninsured benefit plans." M.C.L. § 208.4(3). All parties agree that these payments, which are included in the computation of the SBT, are payments to ERISA plans.

2. *ERISA*

ERISA provides that it shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1001(b) of this title." 29 U.S.C. § 1144(a). While Congress created certain exceptions to the preemption rule, Congress specifically stated that nothing in the exceptions, "shall be construed to exempt from subsection (a) of this section – (i) any State tax law relating to employee benefit plans." 29 U.S.C. § 1144(b)(5)(B). Thus, Congress has explicitly said

that any "State tax law" which "relates to" an ERISA plan is superseded by ERISA.

Plaintiffs assert that the SBT taxes employer contributions to ERISA plans and thus relates to ERISA. Plaintiffs further argue that ERISA preempts the Michigan SBT or that portion of the SBT which taxes employer contributions to ERISA plans. Defendants argue that the SBT does not tax contributions to ERISA plans but instead taxes value added. As such, defendants argue, the SBT does not relate to ERISA plans and therefore is not preempted. The case now comes before the court on cross motions for summary judgment.

DISCUSSION

1. *Standard of Review*

Summary judgment is appropriate when there is no genuine issue as to any material fact. In such cases, the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The crux of summary judgment is determining "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202 (1986). In making this determination, the court must draw all justifiable inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

2. *ERISA*

ERISA is a comprehensive federal statute designed to promote the interests of employees and their beneficiaries in employee pension and benefit plans. *Shaw v. Delta Air Lines*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). Congress enacted ERISA to subject employee benefit plans to a uniform system of federal laws governing disclosure, reporting, standard of conduct, remedies, sanctions, and access to federal courts. Since uniformity could not be achieved if ERISA plans were subject to varying state regulations, Congress included safeguards to preclude abuse and frustration of the comprehensive federal regulation it established. *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). Prominent among these safeguards is an expansive preemption provision, found at section 514(a) of ERISA, 29 U.S.C. § 1144(a).

Section 514(a) is deliberately expansive and "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990). The preemption provision has been described as being virtually unique among preemption statutes, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n. 26, 103 S.Ct. 2841, 2854, n. 26, 77 L.Ed.2d 420 (1983), and as "one of the broadest preemption clauses ever enacted by Congress." *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir.1990). Under this provision, ERISA supersedes, "any and all State laws insofar as they . . . relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a).

In *Shaw v. Delta Air Lines*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), the Court determined that "relate to" should be given a broad common-sense meaning. The *Shaw* Court held that a state law need not be specifically designed to affect ERISA plans in order to be preempted. 463 U.S. at 97, 103 S.Ct. at 2900. Further, "relate to" did not require that a state law must directly relate to the subjects covered by ERISA; any connection may trigger preemption. 463 U.S. at 97, 103 S.Ct. at 2900. Finally, a state law is preempted if it relates to ERISA even if the state law is "consistent with ERISA's substantive requirements" or was enacted to effectuate ERISA's underlying purpose. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985).

While ERISA preemption is expansive, it is not all encompassing. Many, if not all, state laws could be held to "relate to" an ERISA plan in some form. Indeed, ERISA could become "a legal black hole with an attractive force no state law could resist." *United Wire and Machine Health and Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1197 (3rd Cir.1993) (Nygaard, J. dissenting).

Thus, the *Shaw* Court found that, "some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100, n. 21, 103 S.Ct. at 2901, n. 21. The Supreme Court has consistently applied this standard since its pronouncement some ten years ago. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52, 56, 111 S.Ct. 403, 406, 112 L.Ed.2d 356 (1990); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829, 108 S.Ct. 2182, 2185, 100 L.Ed.2d

836 (1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985). The task then is to determine the precise relationship between a state law and an ERISA plan, specifically answering the question of whether the state law affects an ERISA plan in too tenuous, remote or peripheral a manner to "relate to" the plan. *Keystone Charter, Assoc. Builders v. Foley*, 837 F.Supp. 654 (M.D.Pa.1993).

3. *The Value Added Tax*

Michigan's SBT is a value added tax. The value added tax (VAT) is a method of taxing business activity commonly used in Europe and Latin America. The VAT, however, has rarely been implemented within the United States. *See* Congressional Budget Office, Effects of Adopting a Value-Added Tax (February 1992). Because the VAT is not commonly understood, I begin with a discussion of the value added tax in general and then turn to the relationship between Michigan's value added tax and ERISA.

A. *Defining Value Added*

Value added is a measure of the entire economic activity of a business or firm. Specifically, value added can be defined as the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale.

James W. Haughey, *The Economic Logic of the Single Business Tax*, 22 Wayne Law Review 1017, 1018 (1976) ("Haughey"). Like a sales tax, a tax on value added is a tax on actual consumption. Harvey S. Rosen, Public Finance, Second Edition 459-478 (1988) ("Rosen"). In contrast, an income tax is a tax on potential consumption, or actual consumption plus net savings. *Id.*

As a tax on consumption, the VAT is a type of sales tax. Charles E. McLure, Jr., The Value Added Tax: Key to Deficit Reduction? 3 (1987); Congressional Budget Office, Effects of Adopting a Value-Added Tax 1 (February 1992). Unlike the retail sales tax, which taxes the value of a product only at the final sale to consumers, the VAT is collected on all sales, retail or otherwise, within an economy. The VAT, however, taxes only increases in value added to a product between sales. Thus, the VAT is a particular means of collecting a general retail sales tax; collecting a smaller tax in stages as goods and services are produced and marketed rather than at the final sale to consumers. *Id.*

If a general sales tax were levied at each stage of production, it would double tax products; that is, tax the same value more than once. This double taxing is known as the cascading effect. The cascading effect is considered economically inefficient because it re-taxes property previously taxed at prior stages of production and processing. Frederick W. Whiteside, *Taxation*, 71 Kentucky Law Journal 479, 481 (1982-83). By taxing only value added at each stage of production, a VAT avoids the cascading effect, which a general sales tax, if collected at each sale,

would incur. Haughey 1018. All VATs, by definition, eliminate the cascading effect. This elimination can be accomplished by three different methods, as discussed below.

B. *Calculating Value Added*

In general terms, the VAT avoids the cascading effect by subtracting previously taxed costs of materials from sales or revenues. Thus, value added can be expressed as the simple equation:

Value Added = Revenues - Cost of Materials.

Trinova v. Michigan Dept. Of Treasury, 498 U.S. 358, 364-65, 111 S.Ct. 818, 824-25, 112 L.Ed.2d 884 (1990). Further, the revenue component of this equation can be more specifically defined. A simple example, borrowed from the Supreme Court's analysis of the VAT in *Trinova* at 364-65, 111 S.Ct. at 824-25, defines revenue. Assume a bakery's sole revenue comes from the sale of bread. The bakery's costs consist of materials (flour, sugar, spices, utilities), labor (baker, sales clerk), capital (building, mixer, utensils, oven), and credit (interest paid on loans). Any excess of revenues over costs represents profits. Thus:

Revenue = Cost of Material + Cost of Labor + Depreciation + Interest + Profit.

By subtracting Cost of Materials from each side of the equation the equation becomes:

Revenues - Cost of Materials = Cost of Labor + Depreciation + Interest + Profit.

Thus,

Value Added = Revenues - Cost of Materials;

and,

Value Added = Cost of Labor + Depreciation + Interest + Profit.

These equations form the basis for three different, but equivalent, methods of calculating the VAT.

First, as identified in the initial equation above, the VAT can be calculated by subtracting the cost of materials from revenues. This method of calculation is known as the "subtraction" method. While seemingly simple, and currently used in Japan, the subtraction method is not widely employed.

Second, a VAT can be calculated using the "addition" method. The addition method is identified in the second equation above. Under the addition method, a producer is required to add up all the components of revenue except for the cost of materials. Thus, a producer sums cost of labor, depreciation, interest, and profit. Like the subtraction method, the addition method is not commonly used. Michigan's SBT, however, uses the addition method to calculate the VAT.

Third, the VAT can be calculated using the "credit" method. Under the credit method, a tax is levied against revenue; that is, the entire sales price of a given product. However, the producer who pays the tax is then issued a credit for the VAT previously paid during production of the product. Thus, while the credit method does not subtract cost of material prior to levying the tax, a credit for taxes previously paid on those materials is issued to the producer. This credit avoids the cascading effect which would otherwise be inherent in the tax. The credit

method, the most commonly used method of computing the VAT, is used throughout Europe.

Regardless which of the three calculation methods is employed (subtraction, addition or credit), the nature and amount of the tax is identical. Each methodology imposes a non-cascading sales tax upon economic activity. In other words, a tax on value added. The method of calculation used does not change the fundamental nature of or the amount of the tax. This is true for other types of taxes as well. For example, an individual income tax taxes total income. Yet, total income can be calculated using a number of different equations such as: Wages + Dividends + Interest + Business Profits + Capital Gains; or, more simply: Actual Consumption + Net Savings. Rosen 348-350. Regardless of the equation used, the result is income.

A simple example makes it clear that the method of calculation does not change the nature of or amount of the tax. Assume, again, that a baker's sole revenue comes from the production of bread. Before the baker produces the bread, however, the farmer grows the wheat and the miller grinds it into flour. For ease of calculation, a value-added tax of ten percent is imposed at all stages of production. As the following table illustrates, under any of the calculation methods, the nature of and the amount of the tax remains the same. In each case, subtraction, addition or credit, the tax liability is the same for the farmer, miller and baker. In addition, the total tax liability is the same. Further, the total tax liability is the same if the entire tax is collected only at the final, retail sale.

Basic Transactions

	Farmer	Miller	Baker	Total
Sales	300	700	1,000	2,000
Material	0	300	700	1,000
Wages, Interest, Depreciation	200	200	200	600
Profit	100	200	100	400
Value Added	300	400	300	1,000

Subtraction-Method VAT (Sales – Material)

Sales	300	700	1,000	2,000
Material	0	300	700	1,000
Value Added	300	400	300	1,000
VAT Liability	30	40	30	100

Addition-Method VAT (Wages, etc. + Profit)

Wages, etc.	200	200	200	600
Profit	100	200	100	400
Value Added	300	400	300	1,000
VAT Liability	30	40	30	100

Credit-Method VAT (Tax on Sales – Credit)

Sales	300	700	1,000	2,000
Tax on Sales	30	70	100	200
Credit	0	30	70	100
VAT Liability	30	40	30	100

Retail Sales Tax

Retail Sales	0	0	1,000	1,000
Tax	0	0	100	100

After a full review, I am satisfied that the SBT is a tax on value added at each stage of production. The SBT is not a tax on the individual components of the calculation method chosen, be it subtraction, addition or credit, but is a particular method of collecting a sales tax. Further, I am satisfied that the method of calculating value added is neither economically nor legally significant.

4. *A Direct Tax on Plan Contributions*

Plaintiffs assert that the SBT is a tax on contributions to ERISA plans. As such, plaintiffs argue that the SBT relates to ERISA and should be preempted by ERISA. I am satisfied that plaintiffs' argument fundamentally misinterprets the nature of the value added tax. As discussed above, the VAT is a type of sales tax. It is not a tax on contributions to ERISA plans. The fact that the tax may be calculated, under the addition method, by reference to plan contributions does not change the nature of the tax. Likewise, an individual income tax could be calculated by summing actual consumption, including ERISA plan contributions, plus net interest. This calculation method would not change the fundamental nature of the income tax and thus would not be considered a direct tax on ERISA contributions. Further, the fact that the SBT does not allow for an exclusion or deduction for ERISA plan contributions does not make it a tax on plan contributions.

I conclude that the SBT is not a tax on ERISA plan contributions. Thus, the numerous cases relied upon by plaintiffs to assert that a direct tax on plan contributions is preempted are not relevant. Despite the fact that the SBT is not a tax on plan contributions, it nonetheless would be preempted by ERISA if it relates to ERISA in more than a tenuous, remote or peripheral manner. I now address additional tests to determine if the SBT relates to ERISA.

5. *A Neutral Law of General Application*

Some courts have addressed the question of whether a state law relates to ERISA by determining whether the state law is a neutral law of general application. *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 556 (6th Cir.1987); *United Wire, Etc. v. Morristown Mem. Hosp.*, 995 F.2d 1179, 1191 (3rd Cir.1993); *Combined Management Inc., v. Superintendent of the Bureau of Insurance of the State of Maine*, 22 F.3d 1, 3 (1st Cir.1994). In *Firestone*, the court determined that a local income tax, imposed by the city of Akron on individual income, was not preempted by ERISA. Firestone argued that because some individuals invested some of their income in ERISA plans, the tax affected that investment and thus was preempted by ERISA. The Sixth Circuit determined that the tax was only incidental and found that the tax was not preempted by ERISA, in part because, "where a municipality enacts a neutral income tax of general application which applies to employees without regard to their status as ERISA participants, that tax is not preempted by ERISA." Since the Sixth Circuit's pronouncement, other courts have

looked to determine whether a state law is both neutral and general.

For example, in *United Wire*, the court determined that a law relates to ERISA if it is specifically designed to affect ERISA plans, if it singles out such plans for special treatment, or if it is predicated on the existence of such plans. 995 F.2d at 1192 (citations omitted). Each factor identified in *United Wire* relates to whether the law is neutral and general. The court in *United Wire* determined that because the statute in question was a law of general applicability which functioned without regard to the existence of ERISA plans, that is it was both neutral and general, the statute did not relate to ERISA. 995 F.2d at 1192.

Other courts, however, have found that state laws can relate to ERISA, and thus be preempted, even if they are neutral laws of general application. For example, in *Morgan Guaranty v. Tax Appeals Tribunal*, 80 N.Y.2d 44, 587 N.Y.S.2d 252, 599 N.E.2d 656 (1992), the court determined that a capital gains tax, which was a neutral tax of general application, was preempted by ERISA as applied to ERISA plans. That court determined that the tax law in question, while both neutral and general, nonetheless affected ERISA plans in more than a tenuous, remote or peripheral manner and thus related to ERISA. *See also Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (2d Cir.1993); *E-Systems, Inc. v. Pogue*, 929 F.2d 1100 (5th Cir.1991); *General Motors Corp. v. California State Board of Equalization*, 815 F.2d 1305 (9th Cir.1987); *Birdsong v. Olson*, 708 F.Supp. 792 (W.D.Tex.1989).

The SBT is a neutral tax law of general application, imposed upon all businesses without regard to their status as ERISA plan sponsors. While this fact may support upholding the state law, the above cited cases illustrate that it does not conclusively defeat preemption. Courts have repeatedly found that laws, even if neutral and of general application, are preempted by ERISA if they affect an ERISA plan in more than a tenuous, remote or peripheral manner.

6. *Additional ERISA Tests*

In addition to determining whether a law is a neutral law of general application, the Sixth Circuit, in *Firestone*, identified three non-exclusive factors which a court should look to when addressing whether ERISA preempts a state law. No single factor is considered determinative. These factors have also been identified and employed, in slightly adapted versions, by other courts. *See Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1465-68 (5th Cir.1986); *Birdsong v. Olson*, 708 F.Supp. 792, 798 (W.D.Tex.1989). Under the first *Firestone* factor, the court should determine whether the state law is traditionally an area of state authority. 810 F.2d at 555-56. Under the second factor, the court should determine whether the law affects the relationships among the principal ERISA entities. *Id.* Finally, the court should determine whether the effect on ERISA plans, if any, is incidental. *Id.*

Applying the first *Firestone* factor to the case at bar, I am satisfied that the Michigan SBT involves an area of traditional state regulation. As was the case in *Firestone*,

however, the first factor is not particularly useful as it does not have any relationship to or impact upon whether the law affects an ERISA plan. 810 F.2d at 555.

Plaintiffs assert that the SBT affects the relationships among ERISA contributors, plans and beneficiaries; the second *Firestone* factor. Plaintiffs argue that if ERISA contributions were exempt from the SBT, employers would be encouraged to contribute more to ERISA plans. Thus, plaintiffs argue, the tax affects the decision of employers as ERISA contributors and affects total money available to ERISA plans and beneficiaries. Plaintiffs' argument is not compelling. Exempting ERISA contributions from the SBT calculation may encourage employers to invest in ERISA plans. Yet, there are an unlimited number of other potential state actions which would also encourage investment in ERISA. Non-exemption from the tax base does not establish that the SBT affects the relationships between principal ERISA entities. The VAT affects employers in their capacity as employers, without regard to their status as sponsors of ERISA plans. *See Firestone*, 810 F.2d at 556.

I find that the SBT does not affect the relationships among the principal ERISA entities. The SBT is a tax on employers without regard to their ERISA status. The SBT in no way affects the relationships among those employers and any ERISA plan, ERISA administrator or fiduciary, or ERISA plan beneficiary. Similar to the income tax in *Firestone*, the SBT is levied against all employers regardless of whether or not they contribute to an ERISA plan.

The third *Firestone* factor involves determining whether the effect on an ERISA plan is incidental. I am satisfied that Michigan's SBT has only an incidental effect on ERISA plans. Further, this incidental effect is tenuous, remote and peripheral.

The SBT may affect ERISA plans in two ways. First, as mentioned above, because the SBT does not exempt ERISA contributions from the tax base, the SBT may affect total ERISA contributions by employers. As discussed above, the possible effect on potential contributions fails to affect the relationships among ERISA entities. I am also satisfied that the effect on total contributions to ERISA plans is incidental. The SBT is a sales tax directed at all value added and, like the tax in *Firestone*, simply fails to allow for a deduction for plan contributions. The exempting of ERISA contributions from the tax base was the very issue considered and rejected in *Firestone*. Such a tenuous, remote and peripheral relationship is insufficient to characterize the SBT as related to the benefit plans either directly or indirectly. 810 F.2d at 556.

Further, not only is this effect incidental, but is also unavoidable. For example, even if the SBT fully exempted ERISA contributions from the tax base, it could be argued that the SBT still affected ERISA plans because it did not grant an exemption at 150% of contributions. A 150% exemption would encourage even more investment in ERISA plans. On the other hand, it could be argued that if the SBT did grant an exemption for ERISA contributions it could affect ERISA plans by encouraging contributions. The fact that the effect may be to promote the purpose

and goal of ERISA would not save the law from preemption. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). I find that, while the SBT could minimally affect contributions to an ERISA plan, that effect is tenuous, remote, or peripheral.

The second effect the SBT may have on ERISA plans is due to the fact that the tax reduces the total money available to an employer and thus may reduce contributions to an ERISA plan. This effect is even more remote than the potential effect identified above. This train of logic requires the court to determine that a [sic] if a state law places a cost on a business, it thereby affects a business's total profit, thereby reducing the funds a business has available, and potentially causing the business to contribute less to an ERISA plan. If simply imposing a cost upon an employer were enough to establish preemption, ERISA would necessarily preempt all state environmental laws, zoning laws, safety laws, and taxes, to name but a few. *See Combined Management Inc. v. Superintendent of the Bureau of Insurance of the State of Maine*, 22 F.3d 1, 7 (1st Cir.1994). ("Clearly, any law that increases a company's cost of doing business can be said to affect that business's ability to provide benefits under its welfare benefit plan. This is not the same, however, as imposing burdens on the welfare benefit plan itself.") Without some rational limits, ERISA "could become a legal black hole with an attractive force no state law could resist." *United Wire and Machine Health and Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1197 (3rd Cir.1993) (Nygaard, J. dissenting). I am satisfied the SBT is not preempted by ERISA merely because it imposes a cost on businesses.

I conclude that the SBT does not affect the relationships among ERISA entities and has, at most, an incidental effect on any ERISA plan. Thus, under the standards set forth in *Firestone* and *Shaw*, I find that the SBT relates to ERISA in only a tenuous, remote or peripheral manner.

7. *The SBT's "Reference To" ERISA*

While I conclude that the SBT has no meaningful effect on an ERISA plan or an ERISA entity, that does not end the analysis. Unlike the statute in question in *Firestone*, the SBT specifically "refers to" ERISA plans. At issue before the court is whether that mere reference to, in and of itself, without any finding of effect or relationship, is enough to establish ERISA preemption. Based upon a thorough review of Supreme Court decisions, including the Supreme Court's recent pronouncement in *District of Columbia v. Greater Washington Board of Trade*, ___ U.S. ___, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992), on circuit court and district court cases decided before and after *Greater Washington*, and on common sense reasoning, I conclude that a mere reference to ERISA within a state law does not, in and of itself, mandate preemption.

In *Shaw*, the Supreme Court stated, "a law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or *reference to* such a plan." 463 U.S. at 96-97, 103 S.Ct. at 2899-2900 (emphasis added). While a mere reference to ERISA establishes that a law "relates to" ERISA, the law is preempted by ERISA only if it "relates to" ERISA in something more than a "tenuous, remote or peripheral" manner. 463 U.S. at 100, n. 21, 103 S.Ct. at 2901, n. 21. Since that pronouncement,

the Court has consistently reiterated this standard. *See District of Columbia v. Greater Washington Board of Trade*, ___ U.S. ___, ___, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829, 108 S.Ct. 2182, 2185, 100 L.Ed.2d 836 (1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985). The Court's standard necessarily establishes a two-part test for laws which refer to ERISA. A law "relates to" ERISA if it has a "reference to" an ERISA plan, but is preempted only if it "relates to" ERISA in something more than a "tenuous, remote or peripheral" manner.

The Supreme Court's latest reiteration of this standard was set out in *Greater Washington*. In that case, the Court began by restating the standard established in *Shaw*. First, the Court acknowledged that a law that refers to ERISA relates to ERISA. ___ U.S. at ___, 113 S.Ct. at 583. Second, the Court acknowledged that a law may relate to ERISA in too tenuous, remote or peripheral a manner to mandate preemption. ___ U.S. at ___, n. 1, 113 S.Ct. at 583, n. 1. Justice Thomas, writing for the majority, goes on to state, however, that the state law in question in *Greater Washington*, "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted." ___ U.S. ___, ___, 113 S.Ct. 580, 583. Thus, it appears that in *Greater Washington*, the Court overturns their ten year old two-part analysis, replacing it with a

one-part bright line rule. This new rule, the rule of the forbidden words, appears to be that if a state law makes any reference to ERISA, the law is preempted, regardless of whether the law relates to ERISA in only a tenuous, remote or peripheral manner. Justice Stevens, in a lone dissent, advises the majority of this result. ___ U.S. at ___-___, 113 S.Ct. at 585-588 (dissent of Justice Stevens).

While a single sentence of the majority's opinion in *Greater Washington* appears to overturn the ten year old *Shaw* test, all other evidence, and common sense reasoning, establishes that the Court did not overturn the *Shaw* standard.

First, it is well established that, "courts should not lightly overrule past decisions." *Moragne v. States Marine Lines*, 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, 26 L.Ed.2d 339 (1969). When courts do overturn a previous rule, they usually do so only after clearly articulating reasons for so doing. *See for example Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). The Court in *Greater Washington*, however, fails to acknowledge in any way that it may be directly overturning a ten-year-old standard. In fact, the Court reiterates the *Shaw* test in the very sentence before it purportedly overturns it. While the Court does not acknowledge that it is directly overturning the *Shaw* test, neither does the Court indirectly overturn the *Shaw* test. The Court did not rely on the "mere reference to" reasoning. Instead, there was a finding in *Greater Washington* that the law in question did affect ERISA plans in more than a tenuous, remote or peripheral manner. ___ U.S. at ___, 113 S.Ct. at 583. Thus, given the ambiguous nature of the Court's mere reference

to language and reasoning, I am satisfied that I must follow the well established precedent set forth in *Shaw.*

Second, since the Court's ruling in *Greater Washington,* the lower courts have continued to require a showing of effect in order to establish preemption. In *United Wire, Etc. v. Morristown Mem. Hosp.,* 995 F.2d 1179 (3rd Cir.1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 382, 126 L.Ed.2d 332 (1993) *reh'g. denied,* ___ U.S. ___, 114 S.Ct. 651, 126 L.Ed.2d 608 (1993), the court squarely addressed the issue of whether mere reference to ERISA by a state statute was, in and of itself, enough to establish preemption. In that case, as in this one, the court found that the state law in question had no affect on an ERISA plan and thus related to ERISA only in a tenuous, remote or peripheral manner. Given no effect, the court determined that mere reference to ERISA did not mandate preemption. 995 F.2d at 1192. Finding that a state law that referred to ERISA but failed to affect an ERISA plan was without legal consequence, the court gave the following illustration: "Thus, for example, a state statute providing that 'no employer, including an ERISA plan, shall discriminate on grounds of race or gender' would not be preempted despite its reference to ERISA." 995 F.2d at 1192 n. 6.

Though only a year old, numerous cases have disagreed with *United Wire* on its merits. *Travitz v. Northeast Department ILGWU Health and Welfare Fund; ILGWU,* 13 F.3d 704 (3rd Cir.1994); *Travelers Ins. Co. v. Cuomo,* 14 F.3d 708 (2d Cir.1993); *New England Health Care Emp. v. Mount Sinai Hosp.,* 846 F.Supp. 190 (D.Conn.1994). Reviewing state statutes similar to that in *United Wire,* each of those courts found that the statute affected ERISA plans. In

each of those cases, the courts relied upon the finding of effect in determining that the statute was preempted. None of those courts found that ERISA preempted the state statute in question merely because the statute referred to ERISA. In short, courts have continued to find preemption only after a finding of fact that the state statute in question relates to ERISA in more than a tenuous, remote or peripheral manner. In fact, after a thorough search, I have found no case which has found that ERISA preempts a state law merely because the state law "refers to" ERISA.

Third, a bright line, mere-reference-to test forces an unrealistic and illogical game of semantics upon state legislatures, demanding only that they do not use the forbidden words. This rule fails to require any change to the substance of state laws. For example, in the present case, if the state legislature had established a VAT using the subtraction or credit method of calculation, neither of which would specifically refer to an ERISA plan, then the identical tax would not be preempted. As a further example, in *Firestone*, the City of Akron could have mandated a method of calculation for its individual income tax whereby individuals were required to sum total consumption and net interest. *See* Rosen at 348-350, and supra at 677. Such a law necessarily would refer to ERISA as part of the consumption calculation. Despite the fact that the tax would remain an individual income tax, under the bright line test it would be preempted merely because it referred to ERISA.

Finally, under a bright line, mere-reference-to rule, literally hundreds of existing state laws could automatically be preempted by ERISA if challenged. State laws

can refer to ERISA in one of two ways. First, they can directly refer to ERISA by using the term ERISA or Employee Retirement Income Security Act of 1974. For example, under M.C.L. § 141.634, a Michigan tax law, self-employed individuals are specifically allowed to deduct "payments made to an individual retirement account established pursuant to the employee retirement income security act of 1974, 29 U.S.C. 1001 to 1381, to the extent provided in section 219 of the internal revenue code." Under the mere-reference-to rule, any state law, such as M.C.L. § 141.634, which specifically refers to ERISA would be preempted. Second, a state law can, as is true in this case, refer to ERISA by describing plans, using language such as "benefits from a retirement or pension system." Any state law that refers to ERISA in a similar manner would also be preempted.

A recent Westlaw search of the text of state statutes (including all 50 states, Puerto Rico, the Virgin Islands, and the District of Columbia) identified 432 state statutes which directly refer to ERISA. (The search, conducted in the STAT-ALL (unannotated) data base, was: te(ERISA or "Employee Retirement Income Security Act")). It is unknown just how many more state laws refer to ERISA only by describing plans. While, perhaps some of the 432 statutes identified as specifically referring to ERISA should be preempted by ERISA, it is illogical to blindly strike down all 432 statutes. When it comes to ERISA preemption, "common sense should not be left at the courthouse door." *Greater Washington*, ___ U.S. ___, ___ n. 3, 113 S.Ct. 580, 586 n. 3 (Stevens, dissenting); quoting *Schultz v. National Coalition of Hispanic Health and Human Services Organizations*, 678 F.Supp. 936, 938 (D.D.C.1988).

Based on a review of Supreme Court decisions from *Shaw* to *Greater Washington*, of circuit court and district court cases, and based on common sense reasoning, I conclude that a state law is not preempted by ERISA merely because it "refers to" ERISA.

CONCLUSION

After a thorough review, I conclude that the Michigan SBT is not preempted by ERISA. This conclusion is based on the following facts.

(1) The SBT is a neutral tax of general application which does not single out ERISA plans for special treatment nor predicate rights or obligations on the existence of such plans.

(2) The SBT does not regulate ERISA plans.

(3) The SBT does not affect ERISA plans or the relationships between, or among, ERISA entities.

(4) The SBT is neither a direct nor indirect tax on employer contributions to ERISA plans. The SBT is a value added tax, akin to a sales tax, which merely does not allow a deduction for ERISA contributions made by an employer.

(5) Any minimal effect the SBT may have on employer contributions to ERISA plans is incidental and unavoidable; such an effect could be found in nearly every state law which regulates business. This incidental effect is tenuous, remote and peripheral.

(6) I have found no case that has held a state law "relates to" and is preempted by ERISA merely because it refers to ERISA. Likewise, I decline to so hold.

Based on all of the above, I am satisfied that the SBT does not "relate to" ERISA and thus is not preempted by ERISA. Accordingly, plaintiffs' motion for summary judgment is DENIED and defendants' motion for summary judgment is GRANTED.

Art. 1

Section. 8. The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

Art. VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

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28 USC § 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

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28 USC § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * *

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29 USC § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

* * *

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29 USC § 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt

or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section –

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the

effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provisions of this section –

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides –

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer

welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

Michigan Compiled Laws

205.27a. Selling or quitting business; returns; tax liability; penalties and interest; statute of limitations; personal liability of officers; application, schedule of payment

* * *

(2) A deficiency, interest, or penalty shall not be assessed after the expiration of 4 years after the date set for the filing of the required return or after the date the return was filed, whichever is later. The taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set for the filing of the original return. A person who has failed to file a return is liable for all taxes due for the entire period for which the person would be subject to the taxes. If a person subject to tax fraudulently conceals any liability for the tax or a part of the tax, or fails to notify the department of any alteration in or modification of federal tax liability, the department, within 2 years after discovery of the fraud or the failure to notify, shall assess the tax with penalties and interest as provided by this act, computed from the date on which the tax liability originally accrued. The tax, penalties, and interest are due and payable after notice and hearing as provided by this act.

(3) The running of the statute of limitations is suspended for the following:

(a) The period pending a final determination of tax, including audit, conference, hearing, and litigation of liability for federal income tax or a tax administered by the department.

(b) The period for which the taxpayer and the commissioner have consented to in writing that the period be extended.

(4) The running of the statute of limitations is suspended only as to those items that were the subject of the audit, conference, hearing, or litigation for federal income tax or a tax administered by the department.

(5) if a corporation liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments. The dissolution of a corporation does not discharge an officer's liability for a prior failure of the corporation to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.

(6) Notwithstanding the provisions of subsection (2), a claim for refund based upon the validity of a tax law based on the laws or constitution of the United States or the state constitution of 1963 shall not be paid unless the claim is filed within 90 days after the date set for filing a return.

(7) Subsection (6) does not apply to a claim for the refund of a tax paid for the 1984 tax year or a tax year after the 1984 tax year on income received as retirement or pension benefits from a public retirement system of the United States government if the claimant waives any

claim for the refund of such a tax paid for a tax year before 1984. Claims for refunds to which this subsection applies shall be paid in accordance with the following schedule:

Refunds for tax year:	Payable on or after:
1988 and 1987	July 1, 1990
1986	July 1, 1991
1985	July 1, 1992
1984	July 1, 1993

Section 2. Section 441 of Act No. 281 of the Public Acts of 1967, being section 206.441 of the Michigan Compiled Laws, is repealed.

Section 3. This amendatory act shall not take effect unless House Bill No. 4634 of the 85th Legislature is enacted into law.

This act is ordered to take immediate effect.

Michigan Compiled Laws

208.4. Definitions

Sec. 4.

* * *

(3) "Compensation" means all wages, salaries, fees, bonuses, commissions, or other payments made in the taxable year on behalf of or for the benefit of employees, officers, or directors of the taxpayers and subject to or specifically exempt from withholding under section 3401

of the internal revenue code.[1] Compensation includes, on a cash or accrual basis consistent with the taxpayer's method of accounting for federal income tax purposes, payments to state and federal unemployment compensation funds, payments under the federal insurance contribution act and similar social insurance programs, payments, including self-insurance, for workmen's compensation insurance, payments to individuals not currently working, payments to dependents and heirs of individuals because of current or former labor services rendered by those individuals, payments to a pension, retirement, or profit sharing plan, and payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans and payments of fees for the administration of health and welfare and noninsured benefit plans. Compensation does not include discounts on the price of the taxpayer's merchandise or services sold to the taxpayer's employees, officers, or directors which are not available to other customers or payments to an independent contractor.

* * *

Michigan Compiled Laws

208.9 Definitions

Sec. 9. (1) "Tax base" means business income, before apportionment or allocation as provided in chapter 3,

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[1] 26 U.S.C.A. § 3401.

even if zero or negative, subject to the adjustments in subsections (2) to (9).

* * *

(5) Add compensation.

* * *

Michigan Compiled Laws

208.31. Levy and imposition of specific tax; adjusted tax base; alternative reductions

Sec. 31. (1) There is levied and imposed a specific tax of 2.35% upon the adjusted tax base of every person with business activity in this state that is allocated or apportioned to this state.

* * *

Michigan Dept. of Treasury (Rev. 9/95)

SINGLE BUSINESS TAX ANNUAL RETURN

Issued under authority of P.A. 228 of 1975. See instruction booklet for filing guidelines.

C-8000

1995

IDENTIFICATION

▸ **1** For calendar year **1995** or tax year beginning _____ , **1995**
and ending _____ 19____ .

▸ **5** Federal Employer ID No. (FEIN) or TR No. ☐

2 Name (Type or Print)

6a Check this box if address is new ☐
b Check this box if discontinued ☐
Effective date of discontinuance _____

d/b/a

7 Business Start Date

Street Address

8 Principal Business Activity

City, State, ZIP

▸ **9** Organization Type (check one)

a. ☐ Individual
b. ☐ Fiduciary
c. ☐ Professional Corp.
d. ☐ S-Corp.
e. ☐ Other Corp.
f. ☐ Partnership
g. ☐ Limited Liability Co.

▸ **3** Check this box if you are filing a Michigan consolidated return. ☐
Enter authorization number _____

▸ **4** Check this box if you are a member of a controlled group (see instruction book) ☐

10	Gross receipts	▸ 10	.00
11	Business income. Filers using the Short-Method, go to C-8000S, line 9	▸ 11	.00
	COMPENSATION		
12	Salaries, wages and other payments to employees	▸ 12	.00
13	Employee insurance plans - health, life	▸ 13	.00
14	Pension, retirement, profit sharing plans	▸ 14	.00
15	Other payments - supplemental unemployment benefit trust, etc.	▸ 15	.00
16	**Compensation.** Add lines 12 - 15	16	.00
	ADDITIONS (to the extent deducted in arriving at business income)		
17	Depreciation and other write-off of tangible assets	▸ 17	.00
18	Taxes imposed on or measured by income (city, state, foreign)	▸ 18	.00
19	Single business tax	▸ 19	.00
20	Dividends, interest and royalty expenses	▸ 20	.00
21	Capital loss carryover or carryback	▸ 21	.00
22	Net operating loss carryover or carryback	▸ 22	.00
23	Gross interest and dividend income from bonds and similar obligations issued by states other than Michigan and its political subdivisions	▸ 23	.00
24	Any deduction or exclusion due to classification as FSC or similar classification and expenses of financial organizations (see inst.)	▸ 24	.00
25	Losses from partnerships. Account no. _____	▸ 25	.00
26	**Total Additions**. Add lines 17 - 25	26	.00
27	**Subtotal**. Add lines 11, 16 and 26	27	.00
	SUBTRACTIONS		
28	Dividends, interest and royalty income included in business income	▸ 28	.00
29	Capital losses not deducted in arriving at business income	▸ 29	.00
30	Income from partnerships included in business income, Account no. _____	▸ 30	.00
31	**Total Subtractions**. Add lines 28 - 30	31	.00
	TAX BASE		
32	**Tax Base**. Subtract line 31 from line 27	32	.00
33	**Apportioned Tax Base**. Multiply line 32 by % from form C-8000H, line 16 or 19	33	.00

▼ Attach your check here ▼

Go to page 2

PAYMENT

63 What amount did you enter on page 2, line 59? **PAY THIS AMOUNT** ▸ **63** _____ .00

Federal Forms: Attach copies of the forms listed in the instructions to your return.
Payment: Payable to "State of Michigan." Write your FEIN on the check.

Mail to: **Michigan Dept. of Treasury**
P.O. Box 30059
Lansing, MI 48909

Federal Employer Identification Number _____

TAX BASE

34 What amount did you enter on line 32 or 33 (whichever applies)? ..... 34 _____.00

ADJUSTMENTS

35 Capital acquisition deduction (C-8000D, line 4 or 5, whichever applies) ..... 35 _____.00

36 Recapture of capital acquisition deduction (from form C-8000D, line 21) ▸ **36** _____.00

37 Net capital acquisition deduction. Subtract line 36 from line 35 ..... 37 _____.00

NOTE: A negative amount on line 37 will increase your tax base.

38 ADJUSTED TAX BASE BEFORE loss deduction and statutory exemption.
Subtract (if negative add) line 37 from line 34 ..... ▸ **38** _____.00

If negative, this is a business loss carryforward; **do not complete lines 39 through 50.**

39 Business loss deduction ..... 39 _____.00

40 **ADJUSTED TAX BASE BEFORE STATUTORY EXEMPTION.** Subtract line 39 from line 38 ..... 40 _____.00

STATUTORY EXEMPTION Complete and attach the *Statutory Exemption Schedule* (form C-8043).

41 Allowable statutory exemption (from form C-8043, line 16) ..... 41 _____.00

42 **ADJUSTED TAX BASE.** Subtract line 41 from line 40. Check if C-8000G is attached ▸ a☐ ..... 42 _____.00

REDUCTIONS, CREDITS, TAX

43 Reduction to adjusted tax base, if applicable (see instructions for form C-8000S) ..... 43 _____.00

44 Taxable base. Subtract line 43 from line 42. If you used the gross receipts short-method, enter the amount from form C-8000S, line 14 ..... 44 _____.00

45 **TAX BEFORE CREDITS.** Multiply line 44 by 2.3% (.023) ..... ▸ **45** _____.00

The small business and contribution credits are computed on form C-8000C, *SBT Credits.* Complete the C-8000C before continuing. If you are not filing a C-8000C, enter the amount from line 45 on line 46.

46 Enter either the amount from form C-8000, line 45 or C-8000C ..... 46 _____.00

47 Unincorporated/S-Corp. Credit. Multiply line 46 by percent from page 14 ... 47 _____.00

48 Miscellaneous Credits. See instructions and attach schedule ..... 48 _____.00

49 Add lines 47 and 48 ..... 49 _____.00

50 **TAX AFTER ALL CREDITS.** Subtract line 49 from line 46 ..... ▸ **50** _____.00

PAYMENTS AND TAX DUE

51 Overpayment credited from 1994 ..... 51 _____.00

52 Estimated tax payments ..... 52 _____.00

53 Tax paid with request for extension ..... 53 _____.00

54 WDSB credit (Workers Disability Supplemental Benefit) ..... 54 _____.00

55 Total. Add lines 51 - 54 ..... ▸ **55** _____.00

56 TAX DUE. Subtract line 55 from line 50. If less than zero, leave blank ..... ▸ **56** _____.00

57 Underpaid estimate penalty and interest from form C-8020, line 28 or 38 whichever applies ..... 57 _____.00

58 Annual return penalty at ____ % = _____.00 and interest = _____.00 ..... 58 _____.00

59 **PAYMENT DUE.** Add lines 56 - 58. Enter this amount on page 1, line 63 ..... 59 _____.00

YOUR REFUND or OVERPAYMENT

60 OVERPAYMENT. Subtract line 50 from line 55 ..... 60 _____.00

61 How much of the amount on line 60 do you want refunded to you? ..... ▸ **61** _____.00

62 How much of the amount on line 60 do you want credited forward? ..... ▸ **62** _____.00

SIGNATURE AND PREPARER AUTHORIZATION

TAXPAYER'S DECLARATION

I declare, under penalty of perjury, that this return is true and correct to the best of my knowledge.

☐ I authorize Treasury to discuss my return with my preparer.
☐ Do not discuss my return with my preparer.

Taxpayer's Signature	Date
Title	

PREPARER'S DECLARATION

I declare, under penalty of perjury, that this return is based on all information of which I have any knowledge.

Preparer's Signature	Date
Business Address and Phone	

This return is due April 30, or on or before the last dav of the 4th month after the close of your tax year.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

THIOKOL CORP., MORTON INTERNATIONAL, INC., (as successors through corporate reorganization to Morton Thiokol, Inc.), and BEE CHEMICAL COMPANY,	)	
Plaintiffs,	)	No. 4:90-CV-12
-vs-	)	
DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan; and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,	)	
Defendants.	)	

Deposition of JOHN C. HEDLEY, called as a witness by the Defendants, taken before Deborah L. O'Connor, C.S.R., a Notary Public in and for the County of DuPage, State of Illinois, taken at 100 North Riverside Plaza, Chicago, Illinois, on the 12th day of November, 1993, at the hour of 8:40 a.m.

[p. 2] APPEARANCES:

HOWARD & HOWARD ATTORNEYS
BY: MR. PATRICK R. VAN TIFLIN
222 Washington Square North
The Phoenix Building, Suite 500
Lansing, Michigan 48933

on behalf of the Plaintiffs;

MR. FRANK J. KELLEY
Attorney General
BY: MR. DANIEL M. GREENBERG and
MR. MICHAEL R. BELL
Department of Attorney General
First Floor, Treasury Building
Lansing, Michigan 48913

on behalf of the Defendants.

ALSO PRESENT:

Mr. Christopher K. Julsrud
Mr. John F. McDermott
Mr. W. Kurt Meier
Mr. Robert J. Muszanski

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THE WITNESS	PAGE
JOHN C. HEDLEY	
Examination by Mr. Greenberg	4-49

EXHIBITS

No exhibits were marked.

[p. 4] JOHN C. HEDLEY,

called as a witness by the Defendants herein, having been first duly sworn, was examined upon oral interrogatories and testified as follows:

EXAMINATION

BY MR. GREENBERG:

Q. This is the discovery deposition conducted pursuant to Federal Rules of Civil Procedure. It may be used for any permissible purpose under the Rules of Civil Procedure or the Federal Rules of Evidence.

Would you state your name, please, for the record, and spell it?

A. John C. Hedley, H-E-D-L-E-Y.

Q. Your resident address, sir?

A. 221 South Buell, B-U-E-L-L, Avenue, Aurora, Illinois 60506.

Q. Now, you were present for the deposition of Mr. Muszanski, which just concluded, is that true?

A. Yes, I was.

Q. Would you please state your present position with Morton Thiokol?

A. I am the vice president of human [p. 5] resources for Morton International, the successor company.

Q. And to whom do you report?

A. I report to – currently I report to Mr. W. E. Johnston, J-O-H-N-S-T-O-N, who is the vice president, administration. Executive vice president, administration.

Q. Now, does Mr. Julsrud, does he report to you?

A. Mr. Julsrud reports to me.

Q. And his title is?

A. Director of compensation and benefits.

Q. How long have you been employed in your present position?

A. My present position, just short of four years, three years and nine months.

Q. And prior to that?

A. I have been with the company almost 30 years. I was vice president, employee relations, of the salt group of the company for approximately nine years. Prior to that, I was corporate director of labor relations. Prior to that, I was manager of personnel for the Salt Division. Prior to that, I was assistant [p. 6] industrial relations manager.

Q. Briefly, your educational background?

A. I attended City College of New York, Bachelor in social sciences with a major in economics a long time ago.

Q. Your present involvement is with human resources, employee plans, is that correct?

A. I am in charge of all human resources functions for the corporation.

Q. That would –

A. Which would include benefits, recruitment, training.

Q. Hiring of all sorts?

A. Absolutely, labor relations.

Q. Employee problems, that type of sexual harassment claims, you're involved in that kind of thing?

A. Yes.

Q. So employee benefits is a mere piece of what you do?

A. That is correct.

Q. And with respect to Mr. Julsrud, his involvement is more focused on employee benefits, would that be accurate?

[p. 7] A. Employee benefits and compensation, that is correct.

Q. Now, are you aware of the fact that your name is listed as a witness in this case?

A. Yes, I am.

Q. Are you aware that your name is set forth in plaintiffs' response to defendants' interrogatories –

A. Yes, I am.

Q. – in this matter?

A. Yes, I am.

Q. Have you reviewed these interrogatories in preparation for today's meeting?

A. Yes, I have.

Q. Were you consulted with respect to the responses that were put in those responses to interrogatories that were forwarded to us?

A. Yes, I was.

Q. Now, you heard the testimony of Mr. Muszanski. If we could, I'd like to have you take me through the interrogatories starting with No. 5 in the same manner. And I guess if you would indicate that – or review, if you would, Interrogatory No. 5. You need not read it [p. 8] aloud. If you would just review it, take as much time as you need to be comfortable with, one, both what is asked and, two, what is responded by way of answer and indicate to me whether you consider it complete and accurate.

A. It won't take too long because I did, of course, do that while – earlier and I was a part of compiling this answer and yes, I agree with this answer totally.

Q. So this in your view is a complete and accurate response to the question that we posed?

A. It's certainly accurate and it is complete in that this is a very definite cost and – and any cost is important to us in determining what we're going to do with our benefit plans currently and in the future.

Q. Again, if I could ask you to go to Interrogatory 5B and confirm to me if it's accurate that the response to Interrogatory 5A is a complete response?

A. Yes, to the same extent that I just answered for 5A.

Q. Interrogatory 6, the same question, sir?

[p. 9] A. Yes, I agree that the answer to Interrogatory 5A is a complete answer for this interrogatory.

Q. Including all of its subparts, being A, B, and C?

A. Yes, I do.

Q. Interrogatory No. 7, sir, same question with respect to A, B, and C?

A. I guess I would only change B – I would only add to B to the extent that there are a couple of plans in there listed in Exhibit A where – they're very minor part of the plans – where we are committed to a specific amount of money through a collective bargaining agreement and there's not much we can do about it whether we have this tax as an additional cost or not. But that's only true with two very small plans.

Q. Which plans are you referring to, sir? If you would point them out to me on Exhibit A?

A. On the plan at the bottom, the CTMA-IAM joint health and welfare dental trust; plan above that, the Teamsters benefit trust plan; three, the plan above that, the Teamsters miscellaneous security fund, Plan D. And the [p. 10] plan above that, the Central States Southwest Areas pension fund, you'll note that we are listed simply as participants in those plans.

Those plans cover specifically the bargaining unit employees at one of the Salt Division's plants in California and the contractual obligation is to make a monthly contribution to those particular plans and we have, other than taking a strike over not wanting to meet that obligation, we have no choice as to what we're going to do. in that particular situation.

Q. Are these plans you just referred to in which you indicate that you are, on this exhibit, participants, are these what are known as multi-employer plans?

A. They're Taft-Hartley plans. They're multi-employer plans, that is correct.

Q. And the benefit levels attributable to them are negotiated by representatives of various companies with representatives of large unions, is that accurate?

A. The two unions involved are a Teamsters union on the West Coast and IAM or Machinists [p. 11] union on the West Coast and there are employer and union trustees. Each negotiation – we have separate contracts with both of those unions, but we have agreed in the past to participate in those particular plans.

The level of benefits is determined by the joint trustees of the plans and those joint trustees also set a contribution level, which we agree to or take a strike. I mean, it's as simple as that. So we don't have the same capacity to determine the level of benefits that we're going to provide in our pension plan, in our savings plan, in our group insurance plan, all of those plans. We actually set the level of benefits, we – whether we negotiate them or whether we provide them for salaried people. And, therefore, to the extent that costs go up or are higher and we want to control those costs, we can change the level of benefits one way or the other.

In those particular plans, for that one plant in California, we don't have that same degree of control, so it would be, in my opinion, erroneous to say that the fact

that [p. 12] that money is or is not taxed under SBT is a factor for those few plans out there on the West Coast.

Q. Now, the effect, with respect to the multi-employer plans, of not taking a strike, if you will, and agreeing to a contract including benefit levels that are too high would be what?

A. Say again? I'm not –

Q. The effect in dealing with these multi-employer plans of, in your terminology, I'm asking it in the inverse, of not taking a strike, but rather going along with a compensation program including benefits that is too high, what would the impact of that be on the company?

A. It could have a variety of impacts. I mean, that happens to be a salt plant, of which we have a great number in the United States. The benefit levels at that particular plant, as a matter of fact, the labor – the total labor cost including benefits at that plant over a 25-year period of time or 30-year period of time that I've been involved with it have been higher than some of the other plants. As a consequence, the marketing area that is served by that particular [p. 13] plant has steadily shrunk. When I came with the company and was negotiating contracts out there, that plant was serving operations in Arizona, in Washington, in Montana, in Idaho in addition to the California area. Those areas are now being served out of other plants where our labor costs are cheaper, and as a consequence our product costs are cheaper and those benefit costs are just one of the factors of the hired labor costs in that particular plant.

Q. So the company's presently in a position where they have duplicative production capability?

A. In the Salt Division, yes.

Q. Now, in the – is that true with respect to all of these plans or are there some here that are –

A. Those are only true of those plans that I mentioned at the bottom.

Q. We are talking about the plans which are marked with a P as a participant in the sense of participating in a multi-employer –

A. Right. And that's only at that one plant really. The Central Southwest Areas [p. 14] pension plan, that covers a couple of truck drivers down in Greenville, South Carolina, to the best of my knowledge. I think two employees, that's all.

Q. Explain to me, if you would, let's go right to the top of the list here. The collective bargaining employee, I'm referring to the Morton International, Inc., retirement income plan for collective bargaining employees. Are not these bargained for in a way that are somewhat similar to the multi-employer plans?

A. Not even very similar.

Q. Explain to me, if you would.

A. The Morton International, Inc., retirement income plan retirement plan for collective bargaining employees is a company plan, a plan that we designed, a plan that we, as is shown there, are both the administrator and the fiduciary.

We have funded it over the years. It is a plan that we have collectively bargained with the bargaining unit employees at all of the salt operations, with the exception of the California plant that I mentioned as well as [p. 15] a fair number of the chemical operations, and we determined what the level of benefits would be in that plan and we wrote that plan, we decided what the level of benefits in that plan would be.

It's collectively bargained but it's collectively bargained to our tune, if you will. I mean, we tell them, "This is the plan that we are willing to provide."

Q. Now, is it – these employees that are covered by this plan, they are unionized employees?

A. Oh, yes, sure.

Q. And if they are dissatisfied or unhappy with the plan, they, I assume, reserve the right to strike?

A. Oh, yes.

Q. And in the event they do strike, steps necessarily must be taken to induce them to come back or replace them. Are there other options?

A. You can close the plant, but I would say we have never been in a position or – we have never been in a position where we have gone to replacements. We have had strikes. I think I have the scars, as a matter of fact.

[p. 16] Q. You have been involved awhile?

A. Yes. I mean, they could strike over those benefits. I would say – I can honestly say that I don't think we have ever had a strike where the pension plan is an issue.

However, many times across the table the unions at these particular plants – and we don't have any multi-plant contracts.

Every single plant we have has an individual contract for that plant. We're not like the automobile companies, for example. And, yes, there are many times when they will ask for an increase in the pension formula. Currently the formula is basically one percent of their final average earnings times their years of service, and they'll ask for 1.1 or 1.2. And they'll ask for changes in the disability provisions, for the incapacity provisions.

Those are all subjects of bargaining across the table. I can honestly say I don't think we've ever really had a strike that I could attribute, however, to our position on pension.

Q. Isn't it true that the pension is one [p. 17] element in a total compensation package?

A. That's correct. We have had strikes – we've very definitely had strikes over differences of opinion on the Morton International, Inc., primary employee benefits plan. That would be a medical and dental plan.

Q. Once you negotiate a contract with one of your plants, for what period of time does that typically run, what's the term of these various negotiated contracts?

A. There's no absolute model. I would say that probably since the late '70s and early '80s our typical contract has been three years. We have a few that are two years. We have one that is five years. We have one that is four years. I can only remember two in my 30 years

where we were less than two years for a specific reason. We went for –

Q. During the term of these contracts, the benefit levels, the wages and so on are fixed, is that accurate?

A. Yes, yes.

Q. Now, some of these plans discussed have provisions that relate to termination, **[p. 18]** termination of a plan. Would that be a subject of collective bargaining?

A. It depends on which plan you're talking about. I mean –

Q. Well –

A. Well, for example, if we wanted to terminate the Morton International, Inc., retirement income plan for collective bargaining employees, let us say that for some reason we decided we wanted to terminate that plan, we would obviously have to negotiate certainly the impact with all of the various unions where within the collective bargaining agreement we assured them this is the plan they would have during the term of that agreement. So I guess to that extent my answer is yes.

Similarly, on Morton International, Inc., primary employee benefits plan, each one of those contracts specifically says that this is the hospital, medical, dental plan that we will provide for the term of the agreement. If we wanted to terminate that plan or wanted to change that plan, we would have to negotiate it. I mean, as a matter of fact during **[p. 19]** the '60s, '70s, and the early '80s when we were in a much pleasanter situation, from my standpoint, than we are now and we were constantly improving that plan, we would unilaterally change the

plan for our salaried employees, we would bargain it at the bargaining units.

Q. You say "unilaterally change." We're talking about unilaterally upgrade?

A. Yes, we would do that only for our salaried people. At the bargaining units we typically would put those changes in as we bargained a new contract.

Q. When you say that, we're talking in the context of the overall compensation program?

A. That's correct. Unfortunately, the costs of employee benefits, which when I first got involved with them back in the '50s were facetiously called fringe benefits, have become such a significant part of the total compensation package that in the last ten years, the changes that we have made in the primary employee benefits plan have been more inclined to be reductions, or at least controls. Increasing the [p. 20] deductibles, eliminating first dollar coverage, things of that kind.

So the converse has been that the salaried people have gotten those reductions sooner than the bargaining unit people because we have taken the position that we had to bargain those reductions across the table.

Q. With respect to this last couple of points you made here, which I believe I can summarize as the changing world where the benefit costs are high, is something that's been going on, I believe your testimony is, since the early '80s, is that accurate?

A. I would say late – '79, '80, from then on.

—

Q. It would be accurate to say, I believe, and correct me here, that the level of benefits made available to an employee, whether he be a rank and file collectively-bargained, whether he be salaried, whether he be top management, that the level of benefits afforded him or her is a very important element in compensation and, therefore, whether a job is attractive to said employee, would that be an accurate statement? [p. 21]

A. We've always liked to think that, yes.

Q. So one of the elements in – from an employees perspective as to whether he or she will take a particular job would be a review of those fringe benefits or now what amount to a fairly major benefit package including health, sickness, disability, 401(k), and so forth. Is that accurate? Is that your testimony, sir?

A. There's no question about that and that's why controlling the cost of those plans becomes very, very important to us because every time we find ourselves in the position of having to control those costs by making a reduction in the benefit, we think that we denigrate the attractiveness of employment with the company.

So every – we have over the years, in the 30 years that I've been with the company, we have changed from an insured plan to something called Med Cap where what is a semi-insured to a self-insured plan, all in an effort to save a little bit of money in terms of the administrative costs of the plan so that we could maximize the actual benefits to the employee rather than the administrative costs, [p. 22] and, I cannot help but say, such as taxes.

Q. If I could, sir, let's take a look at Page 7 of these interrogatories. Let's talk about the excess pension plan, the supplemental executive retirement plan, the special annuity arrangements, the executive survivor's income plan, and the deferred bonus plan. These are what I believe are accurately referred to as nonqualified employee benefit plans, is that your understanding?

A. That is correct.

Q. So are these ERISA plans in your understanding?

A. They are not ERISA plans because they're non-qualified plans.

Q. So these plans are – are these negotiated with individual employees or are these the kinds of plans that cover a certain level of employee across the board?

A. Generally speaking they cover a certain level of employee across the board.

Q. Would – from a certain level up right to the top, would that be accurate?

A. That is correct.

[p. 23] Q. So these are the plans that deal with management and the more highly compensated?

A. That is correct.

Q. And the same concerns that a rank and file employee has with respect to his level of compensation and his benefit package would be shared by management right up into the boardroom, would that be accurate?

A. I would think so, yes.

Q. And to the extent that, in your terms, you denigrate the level of benefits and fringes available to your more highly-compensated, you disadvantage the corporation in its ability to attract the type of employee that you would most seek out?

A. Say again? I think I understand you, but I'd just like to have you rephrase it.

Q. Fair enough. To the extent you don't understand my question, please – to the extent that you denigrate or lower the compensation fringe program for a highly-compensated employee, you lessen the ability of this corporation to compete with other corporations with respect to employing these key management personnel that you [p. 24] seek?

A. One would assume that that's true. That's right. That's the assumption that we operate on when we put these plans together. However, I've got to make the point at this particular point that one of the things that we have always been rather proud of and we tell the unions across the table all the time is that primary Morton International, Inc.'s primary employee benefits plan, the hospital, surgical, medical plan, the plan that most people are the most interested in today, is the same plan for a laborer in one of our unionized plants as for the chairman of the board.

I mean, we have the same basic primary employee benefit plan for both of those individuals. We have the same pension plan basically for me, for Chris, for any of the people in this room and any of the other full-time employees in the company. The excess pension plan is simply there to provide the same formula benefit within

the confines of the restrictive regulations that the IRS has put into effect over the last 15 years.

[p. 25] Q. By that you mean that it allows the income replacement at retirement?

A. To be the exact – based on the exact same formula as it is for a secretary or keypunch operator.

Q. And you do that because of –

A. That's the plan we promised them a long, long time ago. It's a formula that's been in existence as a part of our pension plan for many, many years and we chose to give that same benefit to them regardless of whether we had to do it through a qualified plan or nonqualified plan.

Q. Thank you, sir. If we could, I'd like to go back to the interrogatories here. I'd like to go to No. 10. Now, these – there really hasn't been an answer to these, so I'd like to, if we could, go through these and ask you to give me the facts and where appropriate whether any documents are going to be relied upon with respect to each of these.

Let's start with No. 10, and we asked you to indicate the facts and documents relied upon to substantiate the allegation in the [p. 26] third amended complaint at Paragraph 33. That paragraph states, "Such an increase in the economic burden imposed on a sponsoring employer, administrator or fiduciary, such as plaintiffs, influences and affects the sponsoring employer as plan sponsor, administrator or fiduciary."

A. I'm sorry, where are we?

Q. We're on Page 1.

A. Okay.

Q. No problem.

A. Okay, I'm with you. Would you like me to –

Q. Why don't you read it and I'd be interested in your answer.

A. The phrase, "such an increase in the economic burden," is the increase resulting from the inclusion of fringe benefits or employee benefits in the SBT? Is that –

Q. So your testimony is that – well, the inclusion or the add back results in what, please? I want your words, not mine, if you can.

A. I'm just – I'm just trying to refer back to where such an increase is.

[p. 27] Q. Such an increase in the economic burden, I believe in the context of the complaint, and I can show you that if you'd like, it's –

A. No, I've got to go back to our answer to Interrogatory 9, I think. I can only say what I think I have repeated already in respect to that, that the situation since, I would say, the late '70s in particular and throughout the '80s, the increase in the cost of employee benefits has been as a percentage far more significant than the increase in any of our other labor costs.

We are not very different from most other American companies in that particular regard. We have gone through years where the increases in our self-insured health care plan ran as high as 17 or 18 percent during the

'80s when the CPI was only going up 2 or 3 percent in the mid '80s and our other labor costs were only going up perhaps 4, 4 1/2 percent. So that looking at the specific cost of that benefit program has been almost a constant with upper management. I mean, I can only say that during the '70s we spent very, very little time looking [p. 28] at the cost of our benefit programs, particularly that program. As a matter of fact, we were adding benefits, as I said earlier, and our principal concern was what is the rest of the world doing in this area. That's why we added dental in '75. We made a great number of increases during that period of time.

Now, the president, the CEO are looking to the HR department on almost a quarterly basis for what is happening to the costs of our benefits particularly the health care plan, which is a big, big part of the cost. As a consequence, any way that we can decrease those costs without hurting the impact or the importance of the plan to our employees is very, very important to us.

Q. Now, the costs of these – in particular the health benefits, I mean, setting aside the tax consequences at issue here, how much has that gone up since the 1980s? Has it quadrupled, have we had years that it doubled?

A. We have never had a year that it doubled, thank God, but we have had years where the cost increase went up 20 percent a year. And [p. 29] during the period from about '86 through '89 it went at almost a compound rate of 15 to 20 percent. So that we made very significant changes in the plan in 1989.

Q. What we're referring to now are the actual hard costs of providing the medical type benefits to employees?

A. Absolutely.

Q. Exclusive of the ancillary administrative, the tax and so on, we're talking about the hard medical costs?

A. Yes. So the only reason I hesitated is that we – I said that we were self-insured. We're self-insured through Prudential. We pay an administrative charge to them which is relatively insignificant, but we – I mean, it's a perfect example. We – that cost is roughly five percent, but we argue with them all the time about that particular cost. If they don't handle claims as rapidly as we want them to, they get less than they otherwise would.

Q. So this is your money they're paying out because you're self-insured?

A. That is correct.

[p. 30] Q. So you expect them to pay it out in a timely manner –

A. And accurately.

Q. So you might as well make your employees happy in the process seeing you're going to pay it anyhow?

A. That's right.

Q. If we could now, and I appreciate your vigilance here and your comments. I think you're absolutely correct that in talking with and addressing Interrogatory No. 10, I think we have to go to No. 9.

A. That's all I wanted to make sure of.

Q. As to what the increased economic burden is?

A. Right.

Q. Continuing, if we may, let's take a look at Interrogatory No. 11. I asked you to review it and again it says, "See response to Interrogatory No. 10." Interrogatory No. 10 merely tells me that a Mr. Hedley and a Mr. Julsrud are going to respond and give me my answer. You've responded to No. 10. Tell me if there's anything you want to add in response to [p. 31] No. 11.

A. I don't think so, really. I think that the same answer that I gave to No. 10 applies to No. 11.

Q. No. 12, if we could, the same question to you, sir.

A. Yes, obviously – I want to be totally accurate. Early in the game I made the comment about the four collectively-bargained plans at the end of Schedule A. And –

Q. I see.

A. And the answers I'm giving do not apply to those four plans.

Q. For the reasons that we discussed at some length earlier?

A. That is correct.

Q. So with respect to 12A then, what we've just discussed here, the response to No. 10 and supplemented a little by No. 11, that remains accurate and complete?

A. Yes.

Q. Sub B here, documents and so on?

A. I'm not sure that – I think I can answer it, but I'm not sure that my response to [p. 32] Interrogatory 10 is the same one because this asks for documents and –

Q. Let's read now. We're at No. 12B, is that correct? It says, "Please identify any persons, state any facts, and identify and provide a copy to defendants of any documents" – I believe that should be "relied upon to substantiate the plaintiffs as employers are affected in the administration of employee benefit plans by the calculation of the single business tax."

Let me ask it of you this way. The response you gave with respect to the impact of the tax is as you've indicated just previously, is that correct?

A. Yes.

Q. Is there anything you want to add in response to this particular interrogatory?

A. No, I don't think so. I think from that standpoint what I said for Interrogatory 10 is correct and complete.

Q. If I could ask you now to take a look at Interrogatory No 13.

A. I think it's asking pretty much the [p. 33] same question asked in No. 10 in a different way, so I would say that my answer to No. 10 still remains complete that

yes, it is a specific cost. To the extent that it's an increasing cost, it's going to affect what we will plan to do in terms of our benefits in the future and currently.

Q. I would ask you now to read Interrogatory No. 14 and indicate to me whether your answer to 10 as supplemented by your responses to 11, 12, and 13 is complete or if there's anything you want to add in response to No. 14.

A. Yes, as I understand it, that's one of the things that's particularly bothersome is that, as I understand the calculation of this tax cost, it can disproportionately affect us as a multi-state employer with employees throughout the United States based upon the amount of business that we do in Michigan, where we don't have – where we have a disproportionately lower number of employees as opposed to where we might have them in other parts of the country.

Q. So the single business tax, as you [p. 34] perceive it, appears to be a little disproportionate in its ultimate numerical impact?

A. Yes. I have currently 3,500 going on 4,000 employees in Utah, which is one-third of our employees. We don't do one-third of our business in Utah. And we do a smaller amount of our business in proportion in Utah and we do a greater proportion of our business in Michigan because of the population in Michigan, obviously, than our proportionate number of employees in Michigan. Therefore, the inclusion of a tax on our employee benefit costs in Michigan I think has a disproportionate affect on what we can do for benefits for our employees in Utah.

Q. Bear with me a minute here. Let me review and see if I have anything further.

Are you a member of any of the – I want to use the word "administrative committees" associated with these plans? Is that accurate, administrative committee, is that a term that's utilized?

A. Yes.

Q. Are you a member of any of those [p. 35] committees?

A. Yes, I am.

Q. Who else serves on those committees?

A. Mr. Julsrud, Mr. McDevitt.

Q. How do you spell Mr. McDevitt's name?

A. M-C-D-E-V-I-T-T.

Q. What is his position?

A. He is chief financial officer, vice president and chief financial officer of the corporation.

Q. So he would be in the hierarchy above any of the people that are presently at the table, would that be accurate?

A. I would say that we would like to think that he and I are on an equal footing.

Q. Fair enough. It's a sensitive question.

A. Not really.

Q. I don't want to get you in trouble with other gentlemen sitting here. Now, the committee is these three gentlemen?

A. That's correct.

Q. And that's for most of these plans, all of them?

[p. 36] A. To the best of my knowledge, yes.

Q. Are any of these gentlemen members of the board of directors?

A. No.

Q. And the capacity in which you serve do you get involved in questions of acquisitions, do you do anything other than plan kind of work in your capacity on the committee? Let me start again.

Describe for me, if you would, the nature of the work that the committee does.

A. Generally speaking, the administration committee answers, you know, deals with questions that arise regarding interpretation of the plan. It depends on particularly which plan you're talking about. On the first plan that is listed on Exhibit A, for example, the Morton International, Inc., retirement income plan for collective bargaining employees, there is a disability retirement provision and there is something called an incapacity retirement provision. There are certain criteria that must be met for an individual to qualify for that [p. 37] pension. It is up to the administration committee for that plan to approve and determine whether an individual is entitled to that kind of retirement based on the evidence that is submitted to us.

Neither one of those types of retirement exists under the next pension plan, but if a question arose as to whether an employee in the Morton International, Inc., pension plan has been credited with the right amount of service or their benefits are being calculated correctly, the appeal process would come to that committee, would have to make a decision as to whether the calculations have been done correctly.

The same thing would be true on most of these plans. On the employee savings and investment plan, there are specific provisions for so-called hardship withdrawals which meet the IRS regulations for those hardship withdrawals, and the administration committee has to determine whether indeed those criteria have been met and have to approve the withdrawal from the plan, either partial or whole while the [p. 38] employee is still an active employee.

Q. How about on the investment side of things, is there involvement by this committee on the investment side?

A. Not really.

Q. Who handles the investments?

A. The – well, it depends on which plan you're talking about.

Q. Fair enough. Which is the biggest plan? The first one, is that the main plan, this retirement income plan?

A. I would think that the second plan, the Morton International, Inc., pension plan, is probably the biggest plan at this particular point. However, I would guess that the Morton International, Inc. – or that the employee

savings and investment plan, the Morton International, Inc., employee savings and investment plan, the fourth one down, will overtake it one of these days.

Q. That's the up and coming plan?

A. Well, that's a 401(k) plan.

Q. So a lot of that is employee money?

A. That is correct.

[p. 39] Q. And that is – is that self-directed or are there certain options available to employees?

A. It's self-directed only to the extent that they have three investment options.

Q. And those investment options in that plan are chosen by whom?

A. Well, the compensation committee of the board of directors does indeed have to approve a specific employee benefit plan that is going to have a cost to the company of X dollars, and I can't remember what that limit is now, whether we change it from time to time. I think it was 300,000 at one point and we've increased it. But if we were going to change the investment options, it would not really be the administration committee that would do that, it would be, in the real world, it would be Mr. Julsrud and myself who would probably conclude that we wanted to make a change in the plan for HR reasons.

We would propose that to the senior management of the corporation, that is, the president, the CEO, and the executive vice president. If they agreed, we would then

propose [p. 40] that change if it were significant enough to the compensation committee. Depending upon the rules of the compensation committee, it might require either their approval or that we tell them about it.

Q. Now, are you familiar with the term "fiduciary" and "fiduciary responsibility"?

A. I'm familiar with it.

Q. In your understanding, what does that mean when you function in that capacity?

A. I think that when we function in that capacity, it very definitely means that we have a legal obligation to see that qualified plans operate in conformity with both the law and with the plan as it has been approved by the appropriate approving body. More often than not, the IRS. That we also have an obligation, I think we call it the reasonable man obligation, to act properly in terms of investments, prudently in terms of handling money that has been either contributed by or set aside for the benefits of employees. That's my understanding of fiduciary responsibilities.

Q. Now, in undertaking these [p. 41] responsibilities that you've just described that the committee would take, for example, and included in that would be recommendations to the compensation committee of the board of directors?

A. That's correct.

Q. In undertaking those kinds of responsibilities, do concerns with respect to – strike that. Let me start again.

In undertaking those kinds of responsibilities as a committee and in making recommendation to the board of directors, their compensation committee – I'm going to have to start again yet. I want to make – I want to be careful –

A. I've been in the same position.

Q. Let me make sure I ask the right question so your answer will be responsive. Let's do – let's break it down a little bit.

In acting with respect to your role on the administrative committee insofar as it relates to administration, i.e., determining eligibility, determining whether we're going to pay a benefit out, determining whether a hardship requirement has been met, the [p. 42] concern, the only concern, is the terms of the plan document and the facts as presented to you, is that an accurate statement in your understanding as to how you go about doing or acting in your fiduciary capacity?

A. Yes. I think that that's the biggest problem. You have to remove yourself from any personal biases on that particular question and decide the question on the basis of what the plan really provides.

Q. When you say "personal biases," would you also agree that it is necessary to remove corporate biases or concerns that you may have about other kinds of corporate matters that are not plan related, must you put those out of your mind?

A. Yes, I think so. I think you have to – I think biases period. I would say that you really and truly have

to look at it purely from the standpoint of what does the plan provide.

Q. Now, in your capacity, in your job, are there times when you do not act as a fiduciary in your undertakings?

[p. 43] A. With reference to the plans or –

Q. Well, I'm talking about your responsibilities more generally than with reference to the plans. For example, when you make a recommendation or you think you want to raise a benefit level, do you not concern yourself with the cost to the corporation of such a change?

A. That is correct.

Q. So in that respect you are not focusing on the plan or focusing on the facts presented by a participant, but you are rather focusing upon overall corporate considerations, would that be accurate, sir?

A. I think it has to be, yes.

Q. In your mind, are you acting as a fiduciary when you function in these other capacities? And by that I mean when you concern yourself with, "How much is this going to cost the company? Can we afford this? What kind of year did we have last year?"

A. Well, I'm going to give you a very altruistic answer, but it's based on being in the business I've been in for 40 years. Yes, I think [p. 44] that I am because in the final analysis, the best way for me to protect the benefits for those employees is to make sure that this company survives and, therefore, when I do what I think is best for

the corporation in the long term, I am also doing what is best for the employees of that corporation.

Q. Do you get involved in your job with, for lack of a better word, what I would characterize as general management decisions? Example. "Should we lease a particular piece of property? Should we move our headquarters? Should we acquire another company? Should we move a subsidiary operation from State A to State B?" Are these things that you would generally get involved in – within your responsibilities?

A. Certainly to some extent.

Q. And to what extent would that be?

A. Well, for example, the director of labor relations reports to me. I am responsible for labor relations. The question of moving a plant, closing a plant, particularly if it's a unionized operation, does indeed become one with labor relations implications and I would [p. 45] certainly have a great deal to say about that and what I had to say would probably be given a great deal of weight.

In terms of acquisitions or in terms of dispositions, the question of what – how easy or how difficult it is going to be to meld benefit programs becomes a very significant question; so, again, we would get involved in that particular situation.

Q. Now, when you do so, are you acting as a member of the committee?

A. No.

Q. You're acting in another capacity, is that accurate?

A. Yes.

Q. And the concerns that you have in this other capacity are a continuation from those you have when you function on the committee?

A. Yes, except to the extent that I –

Q. That you indicated of the long term, what's good for the company is ultimately good for the employees?

A. Yes. I don't want to sound like Engine Charley Wilson, but I think that has been true [p. 46] with this particular company. I believe –

Q. Now, am I correct that you do not get involved in, nor do members of the committee get involved in, the actual investment activity, your functions are more administrative?

A. Yes, that's really correct. I mean, we certainly sit in on the report that – that our actuary makes to the compensation committee, but the actual investment matters are really handled by the financial people within the business.

Q. I'm sorry, the financial people –

A. Within the company.

Q. Within the company?

A. Yes. Well, certainly there are – I've got to expand on the question. There are money managers who are handling the pension funds and –

Q. Are they devoted to that? Is that their sole responsibility or do they also function –

A. These are outside money managers who have been selected by the company to manage the portfolios.

Q. By the company. By whom are they [p. 47] selected? Is that a board of directors' determination?

A. The compensation committee of the board of directors does indeed approve the selection of those investment managers, yes.

Q. And is it accurate to say that they review their performance and make determinations as to when those people should be changed?

A. That is correct.

Q. Would that involve input from this administrative committee?

A. No, it would not.

Q. Are you in any way involved in the calculation of the single business tax or the filing of tax returns?

A. No, I'm not.

Q. Are any members of the committee involved in that? That would be Mr. Julsrud, yourself, and Mr. McDevitt, to your knowledge?

A. Mr. – the tax department reports to Mr. McDevitt, so to that extent, yes.

Q. So there's some overlap here. Mr. McDevitt functions as chief financial officer. His responsibilities include what?

[p. 48] A. He has reporting to him a controller and controller's department with all of the functions that

normally report to a controller. He has a treasurer who reports to him, and he has a director of taxation who reports to him.

Q. So the breadth of his activities is really quite broad?

A. That is correct.

Q. It would involve committee matters and it would involve general finance matters, it would involve general investment matters across the board?

A. Yes.

Q. He is the chief financial officer, that's what his title suggests?

A. That's correct.

Q. And he would report directly to the president?

A. No, he also reports to the executive vice president, administration.

Q. How many executive vice presidents do you have at that level?

A. Just one.

Q. So he is basically the president's [p. 49] right-hand man, would –

A. Currently we have something called the office of the chairman of the board consisting of the chairman, who is scheduled to retire on March 31 of next year, and the president of the company. And Mr. Johnston, the executive vice president, administration, reports to the office of the chairman of the board.

Q. The designated money managers that are appointed by the compensation committee of the board of directors, who monitors their activity? Is that – who would report to that subcommittee of the board as to what's going on with the asset management? Would that be Mr. McDevitt?

A. Actually, it would be people who work for Mr. McDevitt in the treasurer's department.

Q. So their responsibility would be to keep an eye on the funds, how are these investment managers doing? They would report to Mr. McDevitt, he would advise the compensation committee of the board of directors?

A. That is correct.

MR. GREENBERG: That completes my questions. I thank you for your time.

* * *

ANALYSIS OF THE MICHIGAN SINGLE BUSINESS TAX

Taxation and Economic Policy Office

Michigan Department of Treasury

January 1985

Acknowledgements:

This report was prepared by Ronald C. Fisher, Deputy State Treasurer, Robert J. Ballard, Administrator, Planning and Program Analysis Division, and Howard Heideman, Manager, Taxation and Economic Policy Office. Technical assistance and data computations were also provided by Michael Walsh of the Taxation and Economic Policy Office, and Frederick Lynch and his staff in the Single Business Tax Division.

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Appendix A – Questions and Answers on Michigan's Single Business Tax

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* * *

[p. 36] reflects the fact that new firms which tend to be smaller firms, have large capital expenditures which reduce their SBT for several years because of through the carryforward [sic].

Statutory Exemption

A statutory exemption of $40,000 plus $12,000 for each qualified partner or shareholder of Chapter S or professional corporations to a maximum of an additional $48,000 is allowed. The exemption is reduced $2 for every dollar that modified business income exceeds the exemption. Modified business income is business income plus any loss carryovers or carrybacks and compensation and director fees of all shareholders. Consequently, for most taxpayers the statutory exemption is phased out as modified business income approaches $60,000. More than 64,000 businesses had a positive statutory exemption in 1980-81. For those firms who filed, this exemption is estimated to have reduced taxes by $47 million. However, those businesses with gross receipts less than $40,000 are not even required to file SBT returns because the exemption would eliminate their tax liability. Thus the $47 million greatly underestimates the aggregate tax saving from the statutory exemption.

As expected, the data in Table 10 clearly show that the statutory exemption benefits smaller firms. The exemption offsets nearly 64 percent of total tax base for firms in the $1-$39,999 class and 42 percent for firms with adjusted tax base between $40,000 and $99,999. For larger firms, the statutory exemption effect was minimal.

Because of the structure of the statutory exemption, it should be relatively more important for business sectors comprised of smaller firms. The data in Table 9 show, in fact, that the statutory exemption reduced the tax base the most in five sectors: forestry, fisheries and agriculture (17.8%), construction (8.5%), retailing (6.6%), services

(6.0%), and finance and real estate (5.5%). A similar pattern is shown in Table 11, with 78 percent of the total statutory exemption amount claimed by retail, service and construction businesses.

Excess Compensation Reduction

If total compensation exceeds 63 percent of the tax base (before any apportionment for multi-state firms), a business may use this feature to reduce their modified adjusted tax base by the excess compensation percentage above 63 percent, obviously up to a maximum of 37 percent. This reduction is made to modified adjusted tax base, which is the apportioned tax base after subtracting the capital acquisition deduction, any negative base carryforward, and the statutory exemption.

For example, suppose that compensation (wages, salaries, payroll taxes, unemployment and workers' compensation costs, insurance benefits) represents 80 percent of a firm's total tax base. That business may then reduce its modified adjusted tax base by 17 percent (80% – 63% = 17%). In 1980-81, this excess compensation reduction was used by nearly 46,000 businesses with a resulting tax reduction of nearly $163 million.

HOW IS THE SBT CALCULATED?

Businesses with an SBT liability file a return which is shown in a simplified version in Table A-1. The process of calculating the tax starts by adding up the components of value added. Next, companies operating in other states use an apportionment formula to determine what fraction

of their total value added is subject to the SBT. Third, several deductions are allowed against the apportioned tax base. Lastly, the calculated tax is reduced by several credits.

HOW DOES THE SBT ENCOURAGE CAPITAL INVESTMENT?

The SBT allows a deduction for 100 percent of all real property investments made in Michigan in the year in which the expense is incurred. A deduction for personal property investment is also allowed which, for multistate firms, is apportioned to Michigan based on their percentage of payroll and property in Michigan.

The immediate investment writeoff is more advantageous than the gradual depreciation usually allowed under corporate income taxes. New firms may particularly benefit from the deduction as their initial capital expenditures can reduce and even eliminate their SBT liability.

The capital acquisition deduction reduces the SBT tax base by about 20 percent.

HOW IS THE STATUTORY EXEMPTION CALCULATED?

Businesses are allowed a $40,000 deduction from the tax base, although this deduction is reduced $2 for each $1 that income exceeds $40,000. An additional exemption of up to $48,000 is provided for partnerships and S corporations. For purposes of calculating this deduction, income includes compensation paid to the owners of the firm.

The statutory exemption reduces the SBT base by about 3 percent.

HOW IS THE EXCESS COMPENSATION DEDUCTION CALCULATED?

If compensation exceeds 63 percent of the tax base before deductions, the adjusted tax base (after the capital acquisition deduction and the statutory exemption) is reduced by the percentage that compensation exceeds 63 percent. The deduction cannot exceed 37 percent of the base.

For example, assume a firm has a tax base of $400,000, compensation of $316,000, and a capital acquisition deduction of $20,000. The compensation percentage = 316,000/400,000, or 79 percent. The deduction percentage of 79-63%, or 16%, is applied to the adjusted tax base of $400,000 - $20,000, or $380,000. The reduction, then, is $380,000 x 0.16, or $60,800, leaving a reduced base of $319,200 and a tax liability (before credits) of $7,500.

This deduction, intended to aid "labor intensive" firms, also has the effect of aiding relatively unprofitable firms, because the lower profits are, the higher labor costs are in relation to the total value-added base.

The excess compensation deduction reduces the total SBT by about 11.5 percent.

SBT CALCULATION FOR EXAMPLE CITED APPENDIX A

Federal Taxable Income		30,000
Compensation	+	316,000
Depreciation	+	35,000
Interest Paid	+	19,000
Tax Base		400,000
Capital Acquisition Deduction	-	20,000
Adjusted Tax Base		380,000
Excess Compensation Deduction	-	60,800
Reduced Tax Base		319,200
Tax Rate	x	.0235
Tax Before Credits		7,500
Small Business Credit	-	3,338
Tax After Credits	$	4,162

Excess Compensation Calculation:

316,000 ÷ 400,000 = 79%
- 63%
16%

16% x 380,000 = 60,800

Small Business Credit Calculation:

Profits	$ 30,000
Compensation to Owners	70,000
Adjusted Business Income (ABI)	$100,000

Credit = 100% - $100,000 ÷ (45 x 400,000)
= 100% - 55.5%
= 44.5% x 7,500
= $3,338

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM

THIOKOL CORP

Plaintiff,

vs

MICHIGAN DEPARTMENT
OF TREASURY

Defendant.

Case 93-14987-CM
Judge LAWRENCE M.
GLAZER

ORDER PLACING CAUSE ON INACTIVE DOCKET

At a session of said Court held in the City of Lansing, on the 4, day of August, 1993.

PRESENT: HONORABLE LAWRENCE M. GLAZER
CIRCUIT JUDGE

This cause having come to the attention of this Court for review, and

It appearing that no further progress to trial will be possible because the above matter shall be held in abeyance awaiting the outcome of "Thiokal" pending in the Federal District Court.

IT IS HEREBY ORDERED that this cause be removed from the trial docket and placed upon the inactive docket.

IT IS FURTHER ORDERED that when the obstacle to further progress is removed, counsel shall notify the

Ingham County Circuit Court, Court of Claims Division, who shall then reinstate the matter onto the active docket.

/s/ Lawrence M. Glazer
Lawrence M. Glazer, Circuit Judge

A TRUE COPY
CLERK OF THE COURT
30th JUDICIAL CIRCUIT COURT

Supreme Court, U.S.
FILED
JUN 19 1996
CLERK

No. 95-1913

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THIOKOL CORPORATION, *et al.*,
Petitioners,
v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN; DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan; and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KENDALL L. HOUGHTON *
General Counsel
WILLIAM D. PELTZ
GERALD J. MORRIS
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consent of the parties hereto has been obtained and filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers

of Commerce. COST, which separately incorporated on December 11, 1991, has a membership of over 420 major multistate corporations, engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

Many of COST's members are engaged in business in the State of Michigan and thus have a particular interest in the ultimate settlement of the ERISA preemption and statute of limitations questions raised in this case. Moreover, all of COST's members are adversely impacted by the tax laws of one or more other states, where such state laws "relate to" ERISA employee benefit plans through either a reference to or connection with such plans. Given the broad impact on the United States business community and its employees of the preemption question that this case presents, COST has a duty to assist its members in obtaining more certainty regarding the extent of rights of each sovereign power, where federal and state statutory schemes overlap and arguably infringe upon one another.

SUMMARY OF ARGUMENT

Our common understanding of the principles governing ERISA preemption of state laws has evolved, with this Court's guidance, over the course of years since ERISA's preemption provision was first enacted and later reaffirmed to apply to state tax laws. The precept that a state tax law may "relate to" employee benefit plans for ERISA preemption purposes through either direct reference to, or connection with, such plans is clear beyond cavil. What remains *unclear*, however, is where the line is drawn between state tax laws that have a sufficient relation to employee benefit plans to warrant preemption, and those tax laws that are "too tenuous, remote or peripheral" to justify curbing state powers of taxation.

The time has come for the line to be drawn, and it should be drawn in such a manner as to imbue the ERISA preemption language with force and effect. Although the decided cases appear to rely on disparate factors and to yield numerous irreconcilable tests to determine when a state tax law has crossed the line, nevertheless a set of unified principles can be fashioned to resolve future preemption controversies. First, if the state tax law specifically refers to ERISA plans, it "relates to" those plans and must be preempted. Second, if the effect of the state tax law in question is to exert downward pressure on the amount of the benefit fund that will be available for the provision of benefits, the law "relates to" such fund and must be preempted. In both instances, even if this Court insists on testing the state tax law by reference to the "tenuous, remote or peripheral" analysis—which COST contends is logically applicable only to state tax laws that do *not* directly refer to employee benefit plans—the direct economic impact of the tax law on the employee benefit plans serves as a "line in the sand" of ERISA state tax preemption.

ARGUMENT

I. MANY STATES CURRENTLY IMPOSE TAX BURDENS ON ERISA PLANS, AS EVIDENCED BY OTHER ERISA PREEMPTION LITIGATION IN STATE AND FEDERAL COURTS, AND A TRUE LINE MUST BE DRAWN BETWEEN VALID AND PREEMPTED EXERCISES OF SUCH STATE TAXING JURISDICTION.

In making determinations whether state laws "relate to any employee benefit plan" in such a manner or to such an extent as to be subject to federal preemption under Section 514(a) of ERISA, 29 U.S.C. § 1144(a), this Court has to date "expressed no views about where it would be appropriate to draw the line" between valid and preempted state laws. *Shaw v. Delta Air Lines,*

Inc., 463 U.S. 85, 100 n.21 (1983). But sometimes, and particularly in the context of state taxation, a "bright line" test is needed to prevent the hindrance of interstate commerce by state regulation and to promote settled expectations. Thus, in *Quill Corporation v. North Dakota*, 504 U.S. 298, 312-316 (1992), this Court articulated a bright-line physical presence nexus standard for Commerce Clause purposes (relating to use tax collection duties); anything short of physical presence is insufficient to warrant the imposition of a duty on an interstate seller to become a tax collector.

A similar standard is needed regarding state tax preemption under ERISA. *Cf.* 29 U.S.C. § 1144(b)(5)(B)(i); *E-Systems*, 929 F.2d 1100 at 1103 (citing conference report on ERISA amendment). Numerous cases have been decided but little guidance has been given. A tension has arisen in the arena of ERISA state tax preemption, as state and federal courts pick and choose between (1) the expansive interpretation of ERISA's preemption language urged by this Court in *Delta, supra* (establishing that the key language, "relate to," contemplates that a state law will *either* have a connection with or refer to an ERISA plan) and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (the phrase "relate[s] to" must be given a "broad common-sense meaning"), and (2) the limitations thereto expressed by this Court in *Delta* (a state law "may affect employee benefit plans in too tenuous, remote, or peripheral a manner" to warrant preemption) and in *New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Company, et al.*, 115 S. Ct. 1671 (1995) (absent a direct reference by a state law to ERISA plans, preemption may be premised upon acute, albeit indirect, economic effect of the state law upon such plans). Unfortunately, the result is the very inconsistency and lack of national uniformity in state regulation—specifically, state taxation—of employee benefit plans that the ERISA preemption language was designed to prevent.

For example, the States of Minnesota and Ohio (City of Akron) have been permitted to subject employee benefit plans and the contributions to such plans to certain state tax burdens, while the States of Texas and New York have not, on differing formulations of the factors and based on different lines in the sand. *Compare Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995), *cert. denied sub nom. Boyle v. Smith*, 64 U.S.L.W. 3511 (March 18, 1996) (2% general health care provider tax that can be passed on to purchasers of services has only a tenuous, remote and peripheral effect on ERISA plans), and *Firestone Tire & Rubber Company v. Neusser*, 810 F.2d 550 (6th Cir. 1987) (2% municipal income tax on resident employees that must be withheld by employers deemed a non-preempted general tax of neutral application that applies to employees without regard to their status as ERISA participants), *with E-Systems, Inc. v. Pogue*, 929 F.2d 1100 (5th Cir. 1991) (2.5% Texas Administrative Services Tax, which taxes administrative fees received by a plan and sums received by beneficiaries of a plan, is preempted because it reduces future plan assets and the capability to pay benefits); *In the Matter of Morgan Guaranty Trust Company of New York*, 80 N.Y. 2d 44, 599 N.E.2d 656 (N.Y. Ct. App. 1992) (10% real property transfer gains tax is preempted because it imposes administrative burdens on plan and directly depletes funds otherwise available for provision of benefits); and *NYSA-ILA Medical and Clinical Services Fund v. Axelrod*, 74 F.3d 28 (2nd Cir. 1996), *on appeal to the United States Supreme Court sub nom. De Buono v. NYSA-ILA*, Docket No. 95-1594 (filed April 3, 1996) (.6% Health Facility Act tax imposed on revenues of ERISA plan-operated medical facilities is preempted because it depletes assets earmarked for provision of plan benefits).

Even the district court judges who heard the consolidated cases that are hereby being appealed to this court

could not agree on what the appropriate standards were, or where the line should be drawn. *Compare Akzo America, Inc. et al. v. Michigan Dep't of Treasury*, No. 4:93-CV-101, 1995 U.S.Dist. LEXIS 1784 (W.D. Mich. Jan. 13, 1995) (held, "tenuous, remote or peripheral" exception does not apply to state law that refers to an ERISA plan, therefore ERISA preempts Single Business Tax) *with Thiokol Corp. et al. v. Roberts*, 858 F. Supp. 674 (W.D. Mich. 1994) (held, Single Business Tax is neither direct or indirect tax on ERISA plans, and effect on such plans is incidental, therefore specific reference to ERISA plans is not dispositive).

Although a bright-line test may "appear[] artificial at its edges," *Quill*, 504 U.S. at 315, this Court's observations about the utility of such tests applies with equal force in the context of ERISA state tax preemption controversies:

> This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."

Quill, 504 U.S. at 315-316 (*citing Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959)). Multistate business entities and their employees deserve to know where the line has been drawn in this arena as much as the petitioner and other affected parties in *Quill* did.

II. WHERE CONGRESS AFFIRMATIVELY EXERCISES ITS COMMERCE CLAUSE POWERS TO PREEMPT THE STATES' TAXATION OF AN OBJECT OR ACTIVITY, THIS COURT'S MANDATE IS TO INTERPRET AND TO APPLY SUCH PREEMPTION PROVISIONS IN A MEANINGFUL WAY.

It is time for this Court to draw the ERISA preemption line *somewhere*. Congress has engaged in an affirmative exercise of its Supremacy and Commerce Clause powers in this arena,[1] and as this Court previously stated in *Ingersoll-Rand*, 498 U.S. 133 at 138, where Congress "has expressly included a broadly worded pre-emption provision in a comprehensive statute such as ERISA, our task of discerning congressional intent is considerably simplified." Thus, when this Court limits the broad applicability of ERISA preemption to those state laws that are not "too tenuous, remote or peripheral" to warrant a finding that the law "relates to" the plan, *Delta*, 463 U.S. at 100 n.21, then it must reasonably define the circumstances that demonstrate a sufficient relation between the state law in question and employee benefit plans.

The existing cases decided by both this Court and lower federal and state courts articulate numerous and seemingly irreconcilable tests to determine when a state law has crossed the line.[2] Nevertheless, the facts and legal

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[1] *Cf. Delta*, 463 U.S. 85 and 98 (discussion of legislative history of Section 514(a) of ERISA, which indicates that Congress rejected a narrower preemption provision in favor of the present language).

[2] Compare *Akzo America, Inc. et al. v. Michigan Dept' of Treasury*, No. 4:93-CV-101, 1995 U.S. Dist. LEXIS 1784 (W.D. Mich. Jan. 13, 1995) (held, "tenuous, remote or peripheral" exception does not apply to state law that refers to an ERISA plan, therefore ERISA preempts Single Business Tax) with *Thiokol Corp. et al. v. Roberts*, 858 F. Supp. 674 (W.D. Mich. 1994) (held, Single Business Tax is neither direct or indirect tax on ERISA plans, and effect on such plans is incidental, therefore specific reference to ERISA is not dispositive). Both cases applied tests articulated by this Court to the same set of facts but arrived at opposite conclusions.

analysis presented in most of the cases suggest a set of unifying principles that may be utilized to resolve future preemption controversies in a settled manner. First, if a state tax law directly refers to ERISA plans, it logically and as a practical matter "relates to" those plans for ERISA preemption purposes. That alone should settle the matter. *Cf. The District of Columbia and Sharon Pratt Kelly, Mayor v. Greater Washington Board of Trade*, 506 U.S. 125 (1992) (because the District's Equity Amendment Act specifically referred to ERISA plans, preemption was appropriate "on that basis alone"); Petition, p. 8. By contrast, the application of the "tenuous, remote or peripheral" analysis to a state tax law that directly refers to ERISA plans does not make sense. A state statute either "refers to" ERISA plans or it does not, whereas a state statute's "connection with" ERISA plans is a subjective determination that may be tested by reference to the "tenuous, remote or peripheral" concepts. In fact, the question of subjectivity is endless in this context because the testing tools are themselves as subjective as the "connection with" determination.

Second, if a state tax law does not directly refer to ERISA plans—and even if this Court for any reason chooses to apply the "tenuous, remote or peripheral" analysis to state tax laws which do so with a specific reference—the tax scheme still has a "connection with" those plans that is not tenuous, remote or peripheral and therefore "relates to" those plans for ERISA preemption purposes, where the effect of the tax is to exert a downward pressure on the amount of the benefit fund that will be available for the provision of benefits.

If the line is drawn to preempt state taxes that operate to reduce the funds available to provide employee benefits, then the test would generally align with the federal tax treatment accorded such plans under the Internal Revenue Code. This test also has the effect of requiring that the state tax law affect relations between the principal ERISA

entities (employer, plan, plan fiduciaries, plan participants), and thus implicitly acknowledge the underlying purposes of ERISA itself. *Cf. Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises,* 793 F.2d 1456, 1467 (5th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987).

Such an approach would reconcile most, if not all, of the apparently disparate results in the above-cited cases, and would further serve to impose a uniform national standard upon ERISA preemption determinations with respect to state tax laws, or indeed that are alleged to "relate to" employee benefit plans. For instance, under the proposed test Minnesota would continue to be free to impose general taxes such as sales and excise taxes, when (as in the case of *Boyle, supra*) they are not imposed on the assets of or contributions to employee benefit plans and thus do not have a direct economic impact on the plan's available benefits or ability to fund benefits. Likewise, Akron's municipal income tax is not imposed on ERISA plans' income, but rather on the pre-contribution income of employees without regard to their participation in an ERISA plan; once a participant, the level of benefits available to an employee is not derivative of the economic impact of the tax in question.

On the other hand, the cases of *E-Systems, Morgan Guaranty* and *NYSA-ILA* continue to warrant ERISA preemption under the proposed test. As the court noted in *E-Systems,* the tax there operated to reduce future plan assets and the capability of the plans to pay benefits: "The cost of the plan must therefore increase for the employer and/or employees or the benefits must be adjusted downward to offset the tax bite. This is the type of impact Congress intended to avoid when it enacted the ERISA legislation." *E-Systems,* 929 F.2d 1100 at 1103. And that, of course, is the effect of the tax in this case. *See* Petition, pp. 18-19. The Court in *Morgan Guaranty* also cited the direct and adverse economic effect

of the tax at issue on the employee benefit plan's available funds: "Unlike other forms of general State regulation that may have only incidental effect on plan resources, the gains tax 'directly depletes the funds otherwise available for providing benefits' and flies 'in the face of ERISA's goal of assuring the financial soundness of such plans.'" *Morgan Guaranty*, 80 N.Y.2d 44 at 52.

Finally, the Second Circuit Court of Appeals in *NYSA-ILA* found that the tax in question " 'depletes those assets earmarked for the provision of health care benefits and, as a result, will cause the Funds to reduce benefits provided and/or to charge beneficiaries more in the future for benefits received.' " *NYSA-ILA*, 74 F.3d 28 at 30. Upon remand from this Court with instruction to reconsider its prior decision in light of the recent *Travelers* opinion of this Court, the Court of Appeals took pains in *NYSA-ILA* to articulate the distinctions between the operation of the taxes in each of the cases. *NYSA-ILA* concludes that the non-preemption result in *Travelers* rested on the fact that the statute at issue in *Travelers* did *not* impose surcharges on ERISA plans themselves, but rather on insurance carriers that provided coverage to the plans and their beneficiaries. In contrast,

> The facts of [*NYSA-ILA*] distinguish it from *Travelers*, because, unlike in *Travelers*, there is no third party between the plan and the tax imposed pursuant to the HFA. *Rather, the statute at issue depletes the Fund's assets directly, and thus has an immediate impact on the operations of an ERISA plan.* As we observed in our original opinion, the HFA imposes 'an immediate tax on payments and contributions which were intended to pay for participants' medical benefits . . . [and] thus directly affects the Fund in its principal role as an employee welfare benefit plan.'

Id. at 30 (emphasis added).

When the proposed test is applied to the case at issue, the result is clear: the Michigan Single Business Tax,

through a specific reference to ERISA plans, exerts a direct economic impact upon employee benefit plans, through the effective reduction of employer contributions and hence the benefit fund that will be available to provide benefits to plan participants.

III. THIS PETITION SHOULD BE CONSIDERED IN CONJUNCTION WITH, OR HELD IN ABEYANCE UNTIL DISPOSITION OF, THE PETITION IN *DE BUONO v. NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND*

Subsequent to the release of the above-referenced opinion of the Second Circuit Court of Appeals in *NYSA-ILA* (on remand from this Court), that case has been appealed to this Court a second time, *sub nom. De Buono et al. v. NYSA-ILA Medical and Clinical Services Fund et al.*, S. Ct. Docket No. 95-1594 (filed April 3, 1996). This Court has since requested the Solicitor General to provide a brief commenting on the views of the Administration regarding the proper scope of ERISA preemption. The present case presents equally compelling issues for review, and your *amicus* respectfully requests that this Court either (1) consider the present Petition in conjunction with the Petition in *De Buono, supra,* because the Court will accord itself the broadest presentation of issues, perspectives and analyses that pertain to remaining ERISA state tax preemption controversies in this manner, or (2) hold this Petition in abeyance until a decision has been reached whether to grant review of the *De Buono* case, as the Solicitor General may well provide additional insight into the merits of this case, by addressing the related questions presented by the *De Buono* Petition.

CONCLUSION

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

KENDALL L. HOUGHTON *
General Counsel
WILLIAM D. PELTZ
GERALD J. MORRIS
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222
* Counsel of Record

June 19, 1996

Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

No. 95-1913
In the Supreme Court of the United States
October Term, 1995

THIOKOL CORPORATION, et al.,

Petitioners,

v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN; DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan; and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Daniel M. Greenberg
Michael R. Bell
Assistant Attorneys General
Attorneys for Respondents

June 28, 1996

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QUESTIONS PRESENTED

The Michigan Single Business Tax ("SBT"), Mich. Comp. Laws § 208.1 *et seq.* is a value-added tax using an addition method of calculating value added. It requires taxpayers doing business in Michigan to include in their tax base "compensation", including payments to employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Another Michigan statute, Mich. Comp. Laws § 205.27a(6), imposes a statute of limitations and requires taxpayers seeking refunds on the ground that the tax violates the federal constitution to file such claims within 90 days after the date set for filing a return.

Specifically the issues presented in this case are:

I. Whether ERISA § 514(a) pre-empts the Michigan SBT.

II. Whether ERISA § 514(a) pre-empts the statute of limitation in Mich. Comp. Laws § 205.27a(6).

III. Whether the federal courts have jurisdiction to consider a declaratory judgment seeking declaration that the statute of limitations in Mich. Comp. Laws §205.27a(6) violates the Due Process and Equal Protection Clauses of the United States Constitution.

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In addition to the opinions cited by Petitioners and attached in their appendix, Respondents alert the Court to the March 5, 1993 decision of the Sixth Circuit Court of Appeals in *Thiokol Corp. v. Dep't. of Treasury*,[1] 987 F.2d 376 (6th Cir. 1993), which addressed jurisdictional issues involving the Tax Injunction Act, 28 U.S.C. § 1341, and the Eleventh Amendment of the United States Constitution. (Respondents' App. 9b). In their decision the Court of Appeals affirmed the District Court's dismissal of all claims for monetary damages against all of the Defendants as well as all claims against the Department of Treasury. The Court of Appeals reversed the District Court's dismissal of claims for injunctive and declaratory relief under ERISA as against the Respondent-officials acting in their official capacities and remanded for determination of those issues. Subsequently, the District Court denied Petitioner Thiokol Corporation's request to amend its complaint to seek declaratory relief with respect to the statute of limitations applicable to tax refunds. *Thiokol Corp. v. Roberts*, Case No. 4:90-CV-12, 1994 U.S. Dist. LEXIS 1864 (W. D. Mich. Jan. 28, 1994).[2] (Respondents' App. 1b).

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[1] The complaints filed in this matter named as Defendants the Department of Treasury, State of Michigan, Revenue Division; the State Treasurer in his official capacity; and the Commissioner of Revenue in his official capacity.

[2] This unpublished opinion of the District Court is referenced at footnote 6 in the Court of Appeals opinion on the merits in *Thiokol Corp. v. Roberts*, 76 F.3d 751 (6th Cir. 1996). (Petitioners' App. 26).

COUNTERSTATEMENT OF THE CASE

A. Parties and Nature of the Issue

Petitioners are corporate entities that by virtue of engaging in business activity in the State of Michigan are Michigan Single Business Tax taxpayers. Petitioners also act as sponsors and administrators of qualified employee benefit plans governed by ERISA. When engaged in certain activities specified at Section 3(21), 29 U.S.C. §1002(21)(A), of ERISA, Petitioners are fiduciaries with respect to the benefit plans that they sponsor and administer. Respondents are the Treasurer of the State of Michigan and the Commissioner of Revenue of the State of Michigan, both of whom are statutorily obligated to administer and implement the State's taxing laws, including the Single Business Tax Act, ("SBTA" or "SBT"), Mich. Comp. Laws § 208.1 *et seq.*

Petitioners challenge the inclusion in the SBT tax base of "compensation" to the extent it encompasses contributions to employee benefit plans covered by ERISA. The statutory definition of "compensation", with its detailed list of examples of taxpayer payments included within that definition, reads as follows:

> "Compensation" means all wages, salaries, fees, bonuses, commissions or other payments made in the taxable year on behalf of or for the benefit of employees, officers, or directors of the taxpayers and subject to or specifically exempt from withholding under section 3401 of the internal revenue code. Compensation includes, on a cash or accrual basis consistent with the taxpayer's method of accounting for federal income tax purposes, payments to state and federal unemployment compensation funds, payments under the federal insurance contribution act and similar social insurance programs, payments, including self-insurance, for workmen's compensation insurance, payments to individuals not currently

> working, payments to dependents and heirs of individuals because of current or former labor services rendered by those individuals, payments to a pension, retirement, or profit sharing plan, and payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans and payments of fees for the administration of health and welfare and noninsured benefit plans.

Mich. Comp. Laws § 208.4(3)[3] (emphasis added). (Petitioners' App. 76-77).

The language which Petitioners contend preempts the SBT is set forth at Section 514(a), 29 U.S.C. § 1144(a), of ERISA. That provision reads as follows:

> **(a) Supersedure; effective date.** Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C.S. § 1003(a)] and not exempt under section 4(b) [29 U.S.C.S. § 1003(b)]. This section shall take effect on January 1, 1975.

(Petitioners' App. 2).

B. Jurisdiction

Petitioners assert federal court jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201, and also under 29 U.S.C. §1132(e)(1). (Petition p. 2). Respondents contend that jurisdiction is established by, and limited as set forth in, the Sixth Circuit Court of Appeals decision in *Thiokol Corp. v. Dep't. of Treasury*, 987 F.2d 376 (6th Cir. 1993).

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[3] 1995 Mich. Pub. Acts, No. 285 effective January 9, 1996, amended this definition to exclude specified unemployment, federal insurance contribution act, and worker's compensation payments.

(Respondents' App. 9b). Jurisdiction is premised solely upon 29 U.S.C. §§ 1132(e)(1) and 1132(a)(3). The general jurisdictional provision, 28 U.S.C. § 1331, is inapplicable because suits against states and their officers named in their official capacity are precluded by the Eleventh Amendment. The Declaratory Judgment Act, 28 U.S.C. § 2201, is inapplicable because 29 U.S.C. § 1132 of ERISA provides for all appropriate declaratory and injunctive relief.

The federal courts lack jurisdiction over Petitioners' challenge to the statute of limitations set forth at Mich. Comp. Laws § 205.27a(6), of the Michigan revenue act, Mich. Comp. Laws § 205.1 *et seq.*, for the reason that the action is barred by the Tax Injunction Act, ("TIA"), 28 U.S.C. § 1341, the Eleventh Amendment of the United States Constitution, and application of the comity doctrine.

C. The Single Business Tax Act

The Michigan SBT is a value-added tax imposed on the privilege of engaging in business in Michigan. Mich. Comp. Laws § 208.31(3). Value added by definition represents the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale. *Trinova Corp. v. Michigan Dep't. of Treasury*, 498 U.S. 358, 362; 111 S. Ct. 818; 112 L. Ed. 2d 884 (1991). A value-added tax is a tax on a bona fide non-divisible tax base which is a measure of business activity. *Id.* at 374-375.

Value added can be determined by two equivalent means, i.e., the "subtractive" or the "additive" method. The additive method expresses value added as: the sum of the cost of labor plus depreciation plus interest plus profit. The subtractive method expresses value added as: revenues less cost of materials. Each method provides an identical measurement of value added. *Id.* at 364-365. The SBT tax base, as statutorily prescribed, is calculated by the additive method. *Id.* at 367; *Thiokol Corp. v. Roberts*, 858 F. Supp. 674, 677 (W.D. Mich. 1994) (Petitioners' App. 40), and *Thiokol Corp. v. Roberts*, 76 F.3d 751, 755-756 (6th Cir. 1996) (Petitioners' App. 10). Michigan uses the additive method of calculating the tax base as a convenience to taxpayers for

whom federal taxable income provides a familiar starting point. *Trinova*, 498 U.S. at 377, and *Thiokol Corp.*, 76 F.3d at 755. (Petitioners' App. 11). For corporate taxpayers the calculation starts with business income (defined at Mich. Comp. Laws § 208.3(3) to mean federal taxable income) which is subjected to prescribed additions and subtractions. Mich. Comp. Laws § 208.9. The specific provision at issue ("add back provision") requires the addition of "compensation", as defined in Section 4 of the SBTA, to business income in the SBT tax base calculation. Mich. Comp. Laws § 208.9(5).

In *Trinova*, this Court considered the constitutionality under both the Due Process and Commerce Clauses of the three-factor apportionment formula utilized by the SBTA. 498 U.S. at 361. The *Trinova* Court discussed in great detail the theoretical underpinnings as well as the operational mechanisms of value-added taxation and the Michigan SBT. This Court rejected Trinova's argument that the Michigan SBT can and should be analyzed as three separate and distinct taxes on the major components of the tax base, i.e., compensation, depreciation and income. 498 U.S. at 374-375.

The *Trinova* decision is important in the instant case because it: (1) underscores the value-added nature of the tax; (2) acknowledges the indivisibility of the tax base; and (3) establishes the equivalence of the addition and subtraction methods of arriving at the tax base. This Court explicitly rejected the contentions of Trinova which were premised upon the additive method of the tax calculation:

> Trinova's attempted characterization is arguable only because Michigan calculates value added by the addition method. The addition and subtraction methods of calculating value, however, are but two different paths to the same result. See n 2, supra. Had Michigan calculated the SBT tax base by the subtraction method, reporting total revenues minus total cost of materials, Trinova's characterization would collapse of its own weight.

Id. at 376.

In the present case, Petitioners' claim for pre-emption is predicated wholly on the required add-back of the contributions to and fees associated with certain employee benefit plans. The gravamen of Petitioners' case is the definitional language defining "compensation" and establishing the tax base. This language arises as a result of Michigan's determination to utilize the additive, rather than the subtractive, method of calculating the base.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals correctly decided that Michigan's value-added SBT is not pre-empted because it affects ERISA plans in too tenuous, remote, or peripheral a manner.

1. The Court of Appeals properly recognized the principles of ERISA pre-emption announced by this Court.

Section 514(a) of ERISA sets forth the statutory standard applicable in ERISA preemption cases. That section provides that ERISA shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

The operative words "relate to" were defined in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85; 103 S. Ct. 2890; 77 L. Ed. 2d 490 (1983), where the Court held that a state Human Rights Law which prohibited employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy and a Disability Benefits Law which required employers to pay employees specific benefits "relate[d] to" ERISA benefit plans. 463 U.S. at 97.

In *Shaw*, the Court set forth what has become the standard in pre-emption cases.

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a

connection with or reference to such a plan.[16]

Id. at 96-97.[4]

In reaching its conclusion, the *Shaw* Court stated that § 514(a) should not be read to "preempt only state laws specifically designed to affect employee benefit plans", nor should it be interpreted to preempt only state laws dealing with the subject matters covered by ERISA. *Id.* at 98. Additionally, the Court alluded to the legislative history discussing the scope of the preemption provision which reflects congressional concern with conflicting and inconsistent state and local regulation which could impact negatively on employee benefit plans. *Id.* at 99.

Importantly, the Court in *Shaw* at footnote 21, which immediately follows its holding on the "relates to" issue, indicated that some state actions may affect an employee benefit plan in "too tenuous, remote or peripheral" a way to warrant a finding that the state action "relates to" the plan:

> Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan. Cf. *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118, 121 (CA 2 1979) (state garnishment of a spouse's pension income to enforce alimony and support orders is not pre-empted). The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.

463 U.S. at 101, n 21. (emphasis added).

The standard enunciated in *Shaw* is reiterated in all of this Court's ERISA preemption cases that have been decided since. See, *The District of Columbia and Sharon Pratt Kelley,*

[4] Footnote 16 in the above quotation sets forth Black's Law Dictionary's definition of "relate" as: "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with."

Mayor v. Greater Washington Board of Trade, 506 U.S. 125; 113 S. Ct. 580; 121 L. Ed. 2d 513 (1992), where this Court sets forth the standard established in *Shaw* and then cites to all of the Supreme Court cases subsequent to *Shaw* which utilize the standard. 506 U.S. at 129. The *Greater Washington Board* Court in its statement of the applicable standard paraphrases the *Shaw* exception to preemption at its footnote 1:

> Pre-emption does not occur, however, if the state law has only a "tenuous, remote, or peripheral" connection with covered plans, Shaw, 463 US, at 100, n 21, 77 L Ed 2d 490, 103 S Ct 2890, as is the case with many laws of general applicability, see Mackey, 486 US, at 830-838, and n 12, 100 L Ed 2d 836, 108 S Ct 2182; cf. Ingersoll-Rand, 498 US at 139, 112 L Ed 2d 474, 111 S Ct 478.

506 U.S. at 129.

This Court's most recent pronouncement on ERISA pre-emption reiterated the *Shaw* standard and referred to the exception to preemption as expressed in *Greater Washington Board*. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, __ U.S. __; 115 S. Ct. 1671; 131 L. Ed. 2d 695, 708-709 (1995). In *Travelers*, this Court upheld a statutory scheme which exacted surcharges from patients whose commercial insurance coverage was purchased by employee benefit-care plans governed by ERISA as well as patients whose health maintenance organization's fees were paid by an ERISA plan. In reaching its conclusion, this Court acknowledged that the phrase "relates to" constitutes words of limitation in spite of the extreme breadth that those words potentially convey. The Court explained:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere", H. James, Roderick Hudson xli (New York ed, World's Classics 1980). But that, of course, would be to read

> Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. That said, we have to recognize that our prior attempt to construe the phrase "relate to" does not give us much help drawing the line here.

131 L. Ed. 2d at 705. (emphasis added).

The Court then set forth the *Shaw* definition of "relate to" as encompassing a "connection with or reference to" and states that the surcharge statute does not make "reference" to ERISA plans. In construing the "connection with" language of the standard the Court stated:

> [A]n uncritical literalism is no more help than in trying to construe "relate to." For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections. We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

131 L. Ed. 2d at 705. (emphasis added).

Travelers emphasized the need to look to the objectives of the ERISA statute as a guide to the scope of the state laws that Congress understood would survive preemption. *Id.* at 705. In this regard the *Travelers* Court mentioned the need to minimize the administrative and financial burden of complying with conflicting state regulations in order to permit the nationally uniform administration of employee benefit plans. *Id.* at 706. The Court discussed its prior cases dealing with ERISA pre-emption to underscore the congressional intent to preclude state laws from mandating employee benefit structures, their administration, or alternative enforcement mechanisms. 131 L. Ed. 2d at 706-707.

The *Travelers* Court went on to note that while the New York surcharge statute created an indirect economic effect on choices made by ERISA plans, this was not in itself sufficient to mandate pre-emption.

> If a law authorizing an indirect source of administrative cost [like the garnishment statute in Mackey] is not preempted, it should follow that a law [like New York's surcharge statutes] operating as an indirect source of merely economic influence on administrative decisions, as here, should not suffice to trigger pre-emption either.

Id. at 709.

> 2. The Court of Appeals properly applied this Court's principles of ERISA pre-emption when concluding that Michigan's value-added SBT is not pre-empted.

The District Court, in *Thiokol Corp.*, 858 F. Supp. at 676, understood its task to be that of "determin[ing] the precise relationship between a state law and an ERISA plan, specifically answering the question of whether the state law [at issue] affects an ERISA plan in too tenuous, remote or peripheral a manner to 'relate to' the plan." (Citation omitted). (Petitioners' App. 46).

Realizing that Michigan's SBT is a value-added tax, commonly utilized in Europe and Latin America but not the United States, the District Court in *Thiokol Corp., supra,* appropriately discussed at length the nature of value-added taxation. In doing so, the District Court referred to this Court's discussion of value-added precepts in *Trinova v. Michigan Dep't. of Treasury, supra.*

The opinion set forth several findings regarding value-added taxation in general and the SBT in particular. Specifically, the District Court, in *Thiokol Corp., supra,* concluded that value added is a measure of the entire economic activity of a business which is defined as the increase in the value of goods and services brought about by

whatever a business does to them between time of purchase and time of sale. 858 F. Supp. at 676. (Petitioners' App. 46, 50). The District Court, in *Thiokol Corp., supra,* also stated that value added can be expressed by three different methods -- subtraction, addition, or credit, and that the method of calculation does not change the fundamental nature or the amount of tax. 858 F. Supp. at 677-678. (Petitioners' App. 50). Further, the District Court specifically found that the SBT is not a tax on the individual components of the tax base and is not a tax on an employer's ERISA plan contributions. 858 F. Supp. at 678-679. (Petitioners' App. 52).

Following its discussion of the nature of the tax, the District Court, in *Thiokol Corp., supra,* undertook a thorough analysis of preemption jurisprudence and concluded that any effect or impact that the SBT may have on ERISA plans is incidental and that the effect is tenuous, remote and peripheral. 858 F. Supp. at 680. (Petitioners' App. 57-59). The District Court then discussed and rejected Petitioners' suggestion that this Court's decision in *Greater Washington Board, supra,* mandates a finding of preemption in all instances where a state statute makes a reference to an ERISA plan. 858 F. Supp. at 680-683. (Petitioners' App. 59-65). In conclusion the District Court stated:

> After a thorough review, I conclude that the Michigan SBT is not preempted by ERISA. This conclusion is based on the following facts.
>
> (1) The SBT is a neutral tax of general application which does not single out ERISA plans for special treatment nor predicate rights or obligations on the existence of such plans.
>
> (2) The SBT does not regulate ERISA plans.
>
> (3) The SBT does not affect ERISA plans or the relationships between, or among, ERISA entities.

> (4) The SBT is neither a direct nor indirect tax on employer contributions to ERISA plans. The SBT is a value added tax, akin to a sales tax, which merely does not allow a deduction for ERISA contributions made by an employer.
>
> (5) Any minimal effect the SBT may have on employer contributions to ERISA plans is incidental and unavoidable; such an effect could be found in nearly every state law which regulates business. This incidental effect is tenuous, remote and peripheral.
>
> (6) I have found no case that has held a state law "relates to" and is preempted by ERISA merely because it refers to ERISA. Likewise, I decline to so hold.

858 F. Supp. at 683-684. (Petitioners' App. 66-67).

In *Akzo America, Inc. v. Revenue Division,* Case No. 4:93-CV-101, 1995 U.S. Dist. LEXIS 1784, 1995 WL 44043 (W.D. Mich. Jan. 13, 1995), the District Court agreed with all of the conclusions of the *Thiokol* court save one. (Petitioners' App. 32-33). The District Court, in *Akzo America, supra,* believed that the decision in *Greater Washington Board* mandated pre-emption in all cases where a state statute makes a reference to an ERISA plan. (Petitioners' App. 36-37). The District Court, in *Akzo America, supra,* reached this conclusion in spite of its finding that the SBT had no more than a tenuous, remote or peripheral effect on an ERISA plan. (Petitioners' App. 36). The District Court stated:

> Since the "tenuous, remote, or peripheral" exception does not apply to a state law which refers to an ERISA plan, it is of no effect, in this Court's estimation, that the SBT has merely a tenuous, remote, or peripheral effect on ERISA plans.

(emphasis added). 1995 U.S. Dist. LEXIS 1784 *at 7. (Petitioners' App. 36).

The Court of Appeals concurred with the detailed analysis of Michigan's SBT in *Thiokol Corp., supra,* 76 F.3d at 755-756. (Petitioners' App. 10-13). The appellate court noted specifically that the SBT is a tax on value added, and acknowledged that Michigan chose the addition method of calculating value added as an accommodation to taxpayers because it entailed easier calculations using as the starting point federal taxable income which is familiar to all corporate taxpayers. The Court of Appeals also concluded that a value-added tax is not a tax on the individual components that go into the calculation of value added. 76 F.3d at 755-756. (Petitioners' App. 11-12).

The Court of Appeals began its consideration of whether the SBT is preempted by acknowledging this Court's previous decisions indicating the conspicuous breadth of the ERISA preemption language used by Congress. Citing specifically to this Court's decision in *Shaw, supra,* the Court of Appeals noted that the *Shaw* decision carved out an exception to the ERISA pre-emption provision for those state laws that "affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." The Court of Appeals determined that the *Shaw* exception has continuing viability as evidenced in this Court's decisions in *Greater Washington Board,* and *Travelers. Thiokol Corp.,* 76 F.3d at 754. (Petitioners' App. 6-7).

In reaching its conclusion to uphold the Michigan statutory provision the Court applied the three-part test enumerated by the Sixth Circuit in *Firestone Tire & Rubber Co.*

v. Neuser, 810 F.2d 550 (6th Cir. 1987).[5] Application of the test resulted in a finding that the SBT provision is within the *Shaw* exception as a statute that has "at most, a tenuous, remote, or peripheral effect on an ERISA plan." 76 F.3d at 754-755. (Petitioners' App. 8). In its discussion of the *Shaw* test and the application of ERISA pre-emption, the Sixth Circuit emphasized that the preclusion of state laws creating a burdensome effect on ERISA plans is at the heart of the pre-emption doctrine.

> Congress sought to pre-empt State laws that have a burdensome effect on ERISA plans. When a state law has such an effect on a covered plan, it is pre-empted; when it does not, it is not pre-empted even if it actually refers to ERISA.

76 F.3d at 757. (emphasis in the original).

The Sixth Circuit went on to consider and reject Petitioners' contention, accepted by the District Court, in *Akzo America*, that there is a per se rule of pre-emption in all cases where a state statute makes a reference to ERISA. In reaching its holding, the Court of Appeals concluded that "connection with" and "refers to" cases are not "analytically distinct" but rather are "approximations of the same test"

---

[5] Petitioners at page 14 of their Petition mischaracterize the method of analysis utilized by the Sixth Circuit in *Firestone* and in *Thiokol*. The three-prong analysis in *Firestone* is not an analysis that is separate and distinct from the test enunciated in *Shaw* as suggested by Petitioners. Rather, the *Firestone* three-prong analysis is a methodology used to assist the Court in determining whether the effect of a state law is tenuous, remote or peripheral under the *Shaw* standard. *Firestone, supra* at 555:

> Although no single test has been formulated for determining when a state law falls within the "remote and peripheral" exception to section 1144, several factors have been used in the analysis.

which looks to evaluate and determine if the statutes at issue have an "impermissible effect on a covered plan." 76 F.3d at 758. (Petitioners' App. 19).

B. The Court of Appeals properly rejected Petitioners' challenges to Michigan's Statute of Limitations.

1. ERISA does not pre-empt the Michigan Statute of Limitations governing tax refunds.

Petitioners assert that ERISA pre-empts Michigan's statute of limitations for tax refunds. The Court of Appeals succinctly and correctly addressed this issue. The statute of limitations has no cognizable effect on employee benefit plans. At most the limitations provision has only a peripheral effect on ERISA-based challenges to Michigan's tax laws. The Court of Appeals correctly held that the statute of limitations provision is not pre-empted by ERISA. 76 F.3d at 761. (Petitioners' App. 25-27).

2. Federal Courts lack jurisdiction to address the constitutionality of Michigan's Statute of Limitations.

Petitioners try to portray their claim raising constitutional challenges to Michigan's statute of limitations provision,[6] governing claims for tax refunds as "closely aligned" to their claim that a portion of the SBT tax base is pre-empted by ERISA. (Petition p. 29). The District Court, in *Thiokol Corp. v. Roberts*, Case No. 4:90-CV-12, 1994 U.S. Dist. LEXIS 1864 (W. D. Mich. Jan. 28, 1994) (Respondents' App. 1b), correctly perceived that Petitioners' attack on the statute of limitations is not aligned with the ERISA action but is intertwined with their refund claims which are only appropriately addressed in the state courts. *Thiokol Corp., supra.* (Respondents' App. 6b-7b). As such the Tax Injunction Act and its underlying doctrine rooted in comity militate against the federal courts addressing these issues. This is precisely what the Sixth Circuit held in *Thiokol Corp. v. Dep't. of Treasury*, 987 F.2d 376 (6th Cir. 1993). (Respondents' App. 9b).

[6] Mich. Comp. Laws § 205.27a(6).

Additionally, Petitioners sought a federal court ruling in order to present it as res judicata on state refund claims brought in state courts.[7] As pointed out in *Thiokol Corp. v. Roberts*, Case No. 4:90-CV-12, 1994 U.S. Dist. LEXIS 1864, at *9 (W. D. Mich. Jan. 28, 1994) (Respondents' App. 7b), this is precluded by the rule of law announced in *Green v. Mansour*, 474 U.S. 64, 73; 106 S. Ct. 423; 88 L. Ed. 2d 371 (1985).

C. Petitioners' arguments improperly elevate form over substance and were appropriately rejected by the Court of Appeals.

1. There is no basis for the claim that the SBT affects employee plans.

The Third Amended Complaint filed by Thiokol Corporation in *Thiokol Corp. v. Roberts*, 858 F. Supp. 674 (W.D. Mich. 1994) (Petitioners' App. 40), sets forth nine paragraphs of allegations purporting to detail how the SBT "relates to" ERISA benefit plans, burdens the "sponsoring employer as plan sponsor, administrator and fiduciary", and "influences and affects" Thiokol Corporation and the plans. In response to Respondents' interrogatories seeking to flesh out the factual basis supporting these claims, Thiokol Corporation presented a short statement which reads as follows:

> Response.
>
> * * *
>
> The ability of Petitioners to fund its [sic] employee benefit plans is impacted not only

[7] Petition p. 30:

> **"a determination of the constitutionality of § 27a(6) made by this Court in the context of Petitioners' related ERISA claims would have universal application, and would resolve the issue with precision, authority and finality."**
> (emphasis in original).

> by the direct cost of making the required contributions or paying the expenses incurred, but also by every other expense of doing business, which expenses exert a pressure against the ability to fund employee benefit plans. As the costs of doing business increase, a prudent manager will look for ways to hold total costs down. Some costs can be controlled - others cannot.
>
> Since the Michigan single business tax (SBT) is higher than it otherwise would be if the cost of employee benefits was not included in the tax base, it naturally follows that the SBT is one of the non-controllable costs that brings pressure on management to reduce the amount of employee benefits, a controllable cost. If management determines that benefit levels are not to be decreased, then in the face of other rising costs (including SBT) the cost of maintaining the same level of benefits is higher.
>
> Because the SBT base includes the cost of employee benefits, management can see a direct correlation between that particular tax and the cost of funding employee benefits. This cost relationship effect [sic] Petitioners in their capacities as business entities, employers, plan sponsors, plan administrators and fiduciaries.

(emphasis added).

As the foregoing response reveals, Petitioners assert nothing more than the obvious--the SBT is a tax and as such is another cost of doing business which results in a reduction in funds to the business-taxpayer who is responsible for paying the tax. While such a reduction in funds may influence what an employer can or is willing to pay in wages and employee benefits, it does so in precisely the same

manner as all other tax exactions and necessary expenses.[8]

2. The SBT is not a tax on employer contributions.

The SBT is not a tax on plan contributions.[9] The SBT is not a tax on compensation or profits. It is a tax on value added. Because the SBT is not a tax on compensation, it cannot be a tax on any of the separately enumerated examples of compensation listed within the statutory definition at Mich. Comp. Laws § 208.4(3). This is most clearly evidenced by the fact that there is no direct correlation between contributions to employee benefit plans and SBT liability. To the extent that sums are retained as profit or otherwise consumed in the economic endeavor of the taxpayer the tax liability may not be impacted at all by a decision to lower contributions to a qualified plan. This was recognized by this Court in *Trinova*.

> If Trinova had paid an additional $100 million in compensation during 1980, there is no way of knowing whether, or to what extent, value added would have increased. In fact, value added would not have increased so long as revenues did not increase. These

[8] Petitioners' efforts to interject the "uncontraverted testimony" of John C. Hedley into this case should be scrutinized with care. The references cited do not support the broad contentions that Petitioners attribute to them in their Petition. (Petition pp. 3, 19). Rather, the deposition testimony confirms what Respondents elicited from Petitioner-Thiokol in its interrogatories.

[9] The District Court was emphatic. "Plaintiffs assert that the SBT is a tax on contributions to ERISA plans. As such, Plaintiffs argue that the SBT relates to ERISA and should be preempted by ERISA. I am satisfied that Plaitniffs' argument fundamentally misinterprets the nature of the value added tax." 858 F. Supp. at 679.

> elements of value added are inextricable, codependent variables. *Trinova*, 498 U.S. at 376.

The decision in *Trinova* alerts to the need to determine precisely what is being subjected to tax.

> "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes."

Trinova, 498 U.S. at 374, quoting Jenkins, State Taxation of Interstate Commerce, 27 Tenn. L. Rev. 239, 242 (1960).

The Michigan SBT is precisely what it purports to be: a generally applicable business tax on the privilege of engaging in business in Michigan. Mich. Comp. Laws § 208.31.

When the SBT is understood for what it is, Petitioners' contentions collapse. There is no "reversal" of federal tax deductions for plan contributions as suggested by Petitioners. (Petition p. 2). While federal taxable income is utilized as a convenient starting point to calculate the base,[10] the SBT is unrelated to the federal income tax or any type of income tax. The SBT does not seek payment "for the privilege of sponsoring employee benefit plans". (Petition p. 3). Rather, the SBT imposes a tax on the privilege of doing business measured by value added.

> 3. Cases relied on by Petitioners are distinguishable and irrelevant.

In their petition seeking certiorari in this Court, Petitioners for the first time seek to rely on case law discussing a federal statutory exemption from state or local taxation for "all stocks, bonds, treasury notes, and other obligations of the United States." Rev. Stat. § 3701, 31

[10] Michigan chose the addition method of calculating value added as a convenience to taxpayers for whom federal taxable income provided an easy starting point. *Trinova*, 498 U.S. at 377. This point was recognized by the Court of Appeals, as well. 76 F.3d at 755. (Petitioners' App. 11).

U.S.C. § 742. These cases are inapplicable to the issue of whether ERISA pre-empts state laws. There is an adequate body of case law concerning ERISA pre-emption, and Petitioners' reference to bank share cases is an unnecessary and distracting digression.

The test that is applicable to the determination of ERISA pre-emption does not look to the manner of calculation of a tax. Rather the "relates to" test as established by *Shaw* and its progeny, looks to the "effect" a state law has on ERISA-qualified plans.

Petitioners also cite *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327; 64 S. Ct. 1023; 88 L. Ed. 1304 (1944), and *Oklahoma Tax Comm. v. Jefferson Lines, Inc.*, ___ U.S. ___; 115 S. Ct. 1331; 131 L. Ed. 2d 261 (1995), to advance a claim that the District Court in *Thiokol* and the Court of Appeals ignored the substance of the SBT by their refusal to find preemption of that portion of the "compensation" add-back provision which includes contributions to qualified plans. The cases cited do not support Petitioners' contention. Rather, they support Respondents' position. While the Court in *Jefferson Lines* acknowledged the complementary goals of the sales and use taxes, the opinion stressed the differences between the sales and use tax with regard to the underlying taxable event and who is responsible for the payment of the tax. *Jefferson Lines*, 131 L. Ed. 2d 280. The discussion in *Jefferson Lines* and *McLeod* fully recognized the differences in theory and application of the sales tax as contrasted with the use tax.

In the present case there is only a value-added tax involved. The fact that there are several methods of calculation to arrive at the very same value-added tax base does not alter the theoretical, factual or economic effect of the tax. By beginning its analysis with a discussion of the SBT as a value-added tax and then acknowledging the equivalent calculation methods used to calculate its base, the courts below rejected Petitioners' form over substance

contentions and fairly analyzed the substance of the SBT."

D. There are no compelling reasons to grant Certiorari.

1. There is no conflict with decisions of this Court.

Petitioners contend that the Sixth Circuit Court of Appeals decision conflicts with relevant decisions of this Court. This is simply not true. The District Court, in *Thiokol Corp., supra,* 858 F. Supp. at 674 (Petitioners' App. 40), predicated its analysis on the specific and unique nature of the SBT as discussed in this Court's decision in *Trinova.* The Court of Appeals cited, and agreed with, the District Court's analysis, in *Thiokol Corp., supra,* as to the nature of value-added taxation. 76 F.3d at 755-756. (Petition App. 10-13). In determining whether the Michigan SBT provision should be pre-empted, both the District Court, in *Thiokol Corp.,* and the Court of Appeals relied upon and applied the pre-emption standard set forth by this Court in *Shaw.* The Court of Appeals found that the applicable pre-emption test is the "relates to" test as expressed in *Shaw* which pre-empts state laws that have a "connection with or reference to" an ERISA-covered plan subject to the proviso that some state laws may affect a plan in a manner that is too tenuous, remote, or

" The Sixth Circuit stated as much at p. 756 of its opinion:

> Michigan would achieve the same results by simply defining compensation as all expenditures on behalf of employees, officers and directors or by replacing its addition method with a subtraction method of calculating a value added tax base. Paying proper heed to the Supreme Court's admonition that in tax matters courts should consider "substance not . . . form," see *Diedrich v Commissioner of Internal Revenue,* 457 U.S. 191, 195, 102 S. Ct. 2414, 2417-2418, 72 L. Ed. 2d 777 (1982), it would appear that Michigan's SBT fits within the *Shaw* exception and is not pre-empted by §514(a)." *Thiokol Corp.,* 76 F.3d 751 (6th Cir. 1996) (Petitioners' App. 13).

peripheral to mandate a finding of preemption. Specifically, the Court of Appeals rejected a bright line test for pre-emption predicated on the use of the "ERISA" word or a mere reference to ERISA-qualified plans because such a test failed to address the effect of a state law on a covered plan. 76 F.3d at 756-757. (Petitioners' App. 17-20). Not only is this conclusion fully in keeping with *Shaw*, it is fully in accord with this Court's most recent expressions set forth in *Travelers* in which this Court rejected "an uncritical literalism" in favor of an analysis which looks to the objectives of the ERISA preemption statute and its intent to avoid a multiplicity of regulations impacting plan benefit levels, plan structure or plan administration. *Travelers*, 131 L. Ed. 2d at 705-707.

The record in this case could not be clearer. The SBT does not regulate directly or indirectly any employee benefit plan. The SBT does not seek payment from a plan or trust, mandate benefits, or require action or involvement on the part of any plan, plan trust administrator or beneficiary. The tax is determined and paid by the business-taxpayer with reference to its books and records only. A ruling in favor of the Petitioners and any ensuing refunds paid to Petitioners will not increase the assets of any plan or plan trust. Any impact or effect of the SBT on a qualified plan is at most tenuous, remote or peripheral within the terms of the *Shaw* exception to pre-emption.

2. Petitioners grossly overstate the policy concerns inherent in this case.

Petitioners claim that allowing this case to stand "will be a clarion call to every state and local taxing jurisdiction... to descend upon employers with tax levies designed to capitalize upon an employer's plan contributions." This claim is utter nonsense. States and local tax authorities do not need to await the outcome of this case to impose a value-added tax upon employers. A subtractive type value-added tax patterned after Michigan's SBT would share its theoretical underpinnings and impact employers, plan sponsors and ERISA-qualified plans in the same tangential, remote and peripheral manner as the SBT. Since such a similarly patterned tax would not be pre-empted because it

would neither "refer" to ERISA plans nor affect such plans in more than a peripheral manner, logically the SBT should not be pre-empted.

From the start Respondents' position has been founded specifically on the nature of the SBT as a value-added tax which is capable of being calculated by use of either an additive or subtractive method to arrive at an equivalent measure. Respondents' position as accepted by the courts below is specific to value-added taxes and is not susceptible to the broad application that Petitioners suggest.

While this case is of extreme importance to the fiscal well being of the State of Michigan[12], it is not a case of national significance. Unlike the surcharge statutes in *Travelers* which exist in similar form in numerous states throughout the country, and divided the federal circuit courts[13] prior to this Court's decision in *Travelers*, no other state, besides Michigan, presently is utilizing a value-added tax.

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[12] The record includes the Affidavit of David Kirvan, Administrator for the Single Business Tax Division, Department of Treasury, State of Michigan which indicates that as of September 1995, there were 182 ERISA preemption cases seeking refunds in Michigan Courts for a total of $136,844,353.00. In addition, similar claims awaiting administrative decision totaled approximately $100,000,000.00. The annual reduction in single business tax receipts would amount to approximately $140,000,000.00.

[13] See, *United Wire v. Morristown Memorial Hospital*, 995 F.2d 1179 (3rd Cir. 1993), and *Travelers Insurance v. Cuomo*, 14 F.3d 708 (2nd Cir. 1993).

RELIEF SOUGHT

Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Daniel M. Greenberg
Michael R. Bell
Assistant Attorneys General
Attorneys for Respondents

June 28, 1996
cases/thiokol

APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THIOKOL CORP., MORTON INTERNATIONAL, INC., (as successors through corporate reorganization to Morton Thiokol, Inc.) and BEE CHEMICAL COMPANY,

Plaintiffs,

v.

Case No. 4:90-CV-12

HON. DOUGLAS W. HILLMAN

DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan, and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,

Defendants.
_____/

OPINION RE APPEAL OF MAGISTRATE JUDGE'S ORDER GRANTING LEAVE TO FILE THIRD AMENDED COMPLAINT

Plaintiffs Thiokol Corporation, Morton International, Inc., and Bee Chemical Company, all Michigan corporations, brought this action under the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) ("ERISA") to challenge provisions of the Michigan tax code that require them to pay tax on their contributions to employee benefit plans. They originally sought declaratory, injunctive and monetary relief, the last in the form of refunds for their alleged overpayments under the tax law. At the same time, plaintiffs filed complaints in the Michigan Court of Claims.

Presently before the court is plaintiffs' appeal from a single portion of Magistrate Judge Scoville's September 27, 1993 order. Although permitting plaintiffs to file a third amended complaint, that order prohibited them from seeking

declaratory relief with respect to MCL 205.7a(6); MSA 7.657(27a)(6), a 90-day statute of limitations applicable to the refund claims. Specifically, plaintiffs seek a declaration that the state statute is preempted by ERISA, violative of the Fifth and Fourteenth Amendments of the Constitution of the United States, and inconsistent with Congress's regulation of interstate commerce pursuant to Article 1, Section 8 of the Constitution of the United States. Unless declaratory relief is granted on one of these grounds, plaintiffs will have no opportunity to seek refunds for their alleged tax overpayments.

Case History

In their original complaint, plaintiffs sought: (1) a declaration that Michigan's taxation of contributions to employee benefit plans are invalid and preempted by ERISA; (2) injunctions on the future collection of these taxes and on the defendants' refusal to grant their refund requests; and (3) refunds of their alleged tax overpayment, with interest. Plaintiffs' contemporaneous initiation of an action for refunds in the Michigan courts was intended to preserve their chance to seek refunds in the event this court was unable to grant that relief.

On April 15, 1992, this court found that the Eleventh Amendment of the United States Constitution and the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), barred not only plaintiffs' claims for refunds, but their demands for injunctive and declaratory relief as well. Thiokol Corp. v. Dep't. of Treasury, No. 4:90-cv-12 (W.D. Mich. April 15, 1992). Plaintiffs appealed that ruling, and the Court of Appeals for the Sixth Circuit granted the appeal in part and denied it in part. The court held that the defendants' Eleventh Amendment immunity precludes plaintiffs from seeking monetary relief. It further held, however, that neither the Eleventh Amendment nor the TIA prevents plaintiffs from suing defendant Roberts, the Treasurer of the State of Michigan, or defendant Hoatlin, the Commissioner of Revenue for the State of Michigan, in their individual capacities, for prospective injunctive or declaratory relief. Thiokol Corp. v. Dep't. of Treasury, 987 F.2d 376, 382 (6th Cir. 1993). Thus the Sixth Circuit eliminated plaintiffs'

refund claims. Plaintiffs' only remaining opportunity to obtain refunds is in the Michigan Court of Claims. The Sixth Circuit did not specifically address whether or not the relief plaintiffs seek with respect to the statute of limitations, which is now relevant only to their state court claims for refunds, is within the scope of the prospective declaratory relief that they are permitted to pursue in federal court.

After the Sixth Circuit's decision, plaintiffs sought leave to file this amended complaint on August 31, 1993. Judge Scoville granted plaintiffs leave to file the amended complaint, with the exception of several claims including claims for monetary relief and claims for retrospective declaratory or injunctive relief, which he held to be "outside the scope of the mandate of the Court of Appeals." As a consequence of this ruling, Judge Scoville further held, plaintiffs would not be allowed to seek declaratory relief concerning the statute of limitations pertaining to the refund claims. This appeal followed.

Standard of Review

The first issue raised by this appeal is the appropriate standard of review. Plaintiffs have requested that I treat Judge Scoville's order as an order that effectively dismisses plaintiffs' claim for declaratory relief with respect to MCL 205.7a(6); MSA 7.657(27a)(6), or that grants defendants summary judgment on that claim. Therefore, plaintiffs assert, this portion of the order is subject to de novo review.

28 U.S.C. § 636(b)(1)(A) provides that a magistrate judge may be designated to decide "any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment . . ." (listing additional dispositive pretrial motions). The magistrate judge's opinion on a nondispositive matter may be reconsidered by a district judge if it is shown that it is clearly erroneous or contrary to law. Id.; Fed. R.Civ. P. 72(a); United States Fidelity and Guaranty Co. v. Thomas Solvent Co., 955 F.2d 1085, 1088 (6th Cir. 1992).

Normally, a motion to file an amended complaint is just such a nondispositive motion. See, Parrish v. Ford

Motor Co., 909 F.2d 1484 (Table), 1990 WL 109188, **3-**4 (6th Cir. Aug. 2, 1990). Considering plaintiffs' motion accordingly, I find that Judge Scoville's order is neither clearly erroneous nor contrary to law, and therefore deny plaintiffs' appeal.

Were I to treat the order as having decided a dispositive motion, I would be required to conduct a de novo review of the portion of it to which plaintiffs object. 28 U.S.C. 636(b)(1)(C); United States Fidelity and Guaranty Co., 955 F.2d at 1088. My conclusion under this standard would be the same.

Analysis

The Sixth Circuit reviewed this court's earlier dismissal of plaintiffs' motion to file a second amended complaint in this case, Thiokol, 987 F.2d at 383, and its analysis is applicable here.

Federal Rule of Civil Procedure 15(a) provides that once a response to a plaintiff's complaint has been filed, the plaintiff may amend the complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Supreme Court has interpreted the Rule as meaning that:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith . . . futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). This Circuit has held that an amendment to a complaint would be "futile" in this context where the proposed amendment "could not withstand a motion to dismiss." Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21, 23 (6th Cir. 1980).

Plaintiffs maintain that their proposed amendment is within the scope of the Sixth Circuit's opinion and that it would survive a motion to dismiss. The Sixth Circuit, plaintiffs assert, explicitly permitted them to seek "prospective declaratory and injunctive relief" in federal court. The amendment they propose to make is a demand for an order declaring that a state statute of limitations is preempted by ERISA or unconstitutional or both. This order was part of the relief sought in their original complaint, and therefore, plaintiffs claim, the Sixth Circuit's permission for plaintiffs to pursue their claims for "prospective declaratory and injunctive relief" in federal court must be interpreted to include this relief.

Defendants' position, on the other hand, is that plaintiffs' claim for declaratory relief with respect to the statute of limitations is inextricably connected with their claim for refunds. In addition, it pertains to past tax years. Therefore, defendants maintain, for this court to grant declaratory relief with regard to the statute of limitations would be for it to violate the Eleventh Amendment bar on plaintiffs' claims for refunds and retrospective declaratory relief. Instead, defendants assert, if plaintiffs are successful in their remaining federal court claims, winning the other injunctive and declaratory relief they seek, they may subsequently bring this claim for declaratory relief in the state court with their claim for refunds. For this reason, defendants ask that plaintiffs' appeal be denied.

In the Sixth Circuit's earlier opinion in this case, it affirmed this court's dismissal of plaintiffs' proposed addition of a section 1983 claim to their complaint. Thiokol, 987 F.2d at 383. Plaintiffs then wished to seek damages under the section 1983 claim for their claim that state officials' unlawful collection and retention of tax payments had violated the Commerce Clause. Id. But the Sixth Circuit had held earlier in its opinion that the Eleventh Amendment precluded plaintiffs from seeking monetary relief against the state defendants in federal court. Id. at 382. Section 1983, the court reasoned, was not intended by Congress to be used as a means of avoiding the Eleventh Amendment prohibition on suits against state officials in federal court. Id. at 383, citing, Quern v. Jordan, 440 U.S. 332, 59 L. Ed. 2d 358, 99 S.

Ct. 1139 (1979). Therefore, the court held, the district court was correct to deny plaintiffs leave to add a section 1983 claim to their complaint. Id.

Plaintiffs' present attempt to seek declaratory relief presents a similar problem. The Supreme Court of the United States has held that where a federal court is barred by the Eleventh Amendment from granting monetary relief, and the plaintiffs then seek declaratory relief whose only purpose would be as res judicata in a state court action for the same monetary relief, the federal court may not grant the declaratory relief. Green v. Mansour, 474 U.S. 64, 73, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985).

In Green, two plaintiff classes had challenged Michigan's methods for determining eligibility for benefits under the Aid to Families with Dependent Children ("AFDC") program. Id. at 65. While the cases were pending on the merits, Congress changed the relevant AFDC provisions, and Michigan brought its policy into compliance with the amendments, with the result that the violations of which plaintiffs had complained ceased. Id. at 66. The plaintiffs then pursued claims for declaratory and other relief with respect to defendants' past violations. Id. The Eleventh Amendment precluded them from seeking monetary relief or other retrospective relief against the defendants in federal court. Prospective relief to prevent a continuing violation of federal law would be available, however, under Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). Id. at 68. In Green, however, no continuing violation existed, because the challenged AFDC provisions had been changed. Therefore, the only possible use for the declaratory relief sought by the plaintiffs would be if it were subsequently offered as res judicata on the issue of the state's liability in a state court proceeding by the plaintiffs. The state court could then be left to compute damages. Id. at 73. But the federal court's grant of declaratory relief would then "have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment." Id. To provide the declaratory relief would thus create an "end run," in the words of the Court, around the Eleventh Amendment block. Id., citing, Edelman v.

Jordan, 415 U.S. at 651, 666-669 (1974).

This case is comparable. Here, the plaintiffs have sought declaratory relief with respect to a statute of limitations. The only possible use for a determination by this court that the statute of limitations is either precluded by ERISA or unconstitutional, however, would be in a state court action for refunds. As noted earlier, no action for refunds is possible in federal court due to the Eleventh Amendment. A grant of declaratory relief in this case by this court would not guarantee a finding of liability against the defendants in plaintiffs' state court refund claims, as would a grant of the relief at issue in Green. Nevertheless, the principle from that case that a federal court prohibited by the Eleventh Amendment from granting certain relief against state officials should not facilitate plaintiffs' recovery of that same relief in state court, should apply here as well. Thus, under Green, the declaratory relief may not be awarded by this court. Plaintiffs are free, of course, to seek declaratory relief with respect to the statute of limitations in the Michigan courts.

The retrospective nature of plaintiffs' requested order pertaining to the statute of limitations is another reason for which I cannot grant this appeal. The Sixth Circuit authorized plaintiffs' claims for "prospective declaratory and injunctive relief" against the individual defendants in their official capacity. Thiokol, 987 F.2d at 382. Plaintiffs' seek a declaratory order with respect to a statute of limitations applicable only to claims for refunds, which are clearly retrospective relief. This relief is distinguishable from the "prospective injunctive relief to prevent a continuing violation of federal law" that is obtainable in federal court in spite of the Eleventh Amendment. Green, 474 U.S. at 68, citing, Ex Parte Young, 209 U.S. 123, 155-56, 52 L. Ed. 714, 28 S. Ct. 441 (1908). For this additional reason, this court could not grant plaintiffs' request for declaratory relief, and the amendment to their complaint would not survive a motion to dismiss.

Because I conclude that plaintiffs' claim for declaratory relief would not survive a motion to dismiss, Judge Scoville's denial of leave to include it in their amended complaint was

neither clearly erroneous nor contrary to law. For this reason, I affirm Judge Scoville's order, and deny plaintiffs' appeal.

Were I to review Judge Scoville's order de novo, as proposed by plaintiffs, my analysis would be the same. For the reasons above, plaintiffs' appeal is denied.

Douglas W. Hillman
Senior District Judge

Dated: JAN 28 1994.

ORDER AFFIRMING DECISION OF MAGISTRATE JUDGE

In accordance with the opinion filed this date,

IT IS ORDERED that the decision of Magistrate Judge Scoville, dated September 28, 1993, granting plaintiffs' leave to file a third amended complaint is hereby **AFFIRMED**, and plaintiffs' appeal is **DENIED**.

Douglas W. Hillman
Senior District Judge

Dated: JAN 28 1994.

THIOKOL CORPORATION; Morton International, Inc., as successors through corporate reorganization to Morton Thiokol, Inc.; and Bee Chemical Company,

Plaintiffs-Appellants,

v.

DEPARTMENT OF TREASURY, STATE OF MICHIGAN, REVENUE DIVISION; Douglas B. Roberts, in his official capacity as Treasurer of the State Of Michigan; and Thomas M. Hoatlin, in his official capacity as Commissioner of Revenue of the State of Michigan,

Defendants-Appellees,

Robert Bowman, formerly Treasurer of the State of Michigan in his official capacity; and Melvin Van Vorst, former Acting Commissioner of Revenue of the State of Michigan, in his official capacity,

Defendants.

No. 92-1611

United States Court Of Appeals,
Sixth Circuit

[987 F.2d 376]
Decided March 5, 1993
Rehearing Denied May 3, 1993

Before: KENNEDY and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

KENNEDY, Circuit Judge.

Plaintiffs appeal an order dismissing their complaint in this ERISA action challenging various provisions of the Michigan Tax Code. On January 16, 1990, Thiokol Corporation, Morton International, Inc. and Bee Chemical Company ("plaintiffs"), all Michigan corporations, sued the Revenue Division of the Michigan Department of Treasury, Douglas B. Roberts, in his official capacity as Treasurer of

the State of Michigan and Thomas M. Hoatlin, in his official capacity as Commissioner of Revenue of the State of Michigan ("defendants") in federal district court.[1] Under Michigan's Single Business Tax ("SBT"), contributions to employee benefit plans are taxed. Mich. Comp. Laws §§ 208.4(3), 208.9(5). In their complaint, the plaintiffs sought declaratory, injunctive and monetary relief. In count I, plaintiffs sought a declaration that these provisions of the SBT were invalid and preempted by section 514(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a). In count II, plaintiffs asked the court to enjoin the collection of taxes based on the payment by employers to employee welfare benefit plans and to prohibit defendants from refusing to honor their refund requests. In count III, plaintiffs requested that taxes that they had allegedly erroneously overpaid, be refunded with interest.

On April 15, 1992, the District Court adopted the magistrate judge's Report and Recommendation, which found that the suit was barred by the Eleventh Amendment and the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, as the opinion of the court. The District Court ordered that the plaintiffs' motions for partial summary judgment and leave to file a second amended complaint be denied, and that the defendants' motion for dismissal be granted. This timely appeal followed. For the reasons stated below, we affirm in part and reverse in part.

I.

Two jurisdictional issues of first impression in this Circuit are presented in this appeal. The first involves the intersection of ERISA and the TIA; whether the TIA bars ERISA challenges to state taxes in federal court. The second asks whether by passage of ERISA, Congress intended to abrogate the states' immunity guaranteed by the Eleventh Amendment and subject them to ERISA suits in federal court.

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[1] In the original and first amended complaint, Robert Bowman, former Treasurer and Melvin Van Vorst, former Commissioner of Revenue of the State of Michigan were the named defendants.

A.

The Tax Injunction Act

The TIA provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. The TIA reflects "the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 103, 102 S. Ct. 177, 179, 70 L. Ed. 2d 271, (1981). This exclusion of federal courts from the state taxation area is so far reaching it precludes federal courts from declaring state tax laws unconstitutional. *Id.* (citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S. Ct. 1070, 87 L. Ed. 1407 (1943)). Although the TIA mentions only injunctions, its policy of comity bars declaratory judgment and 42 U.S.C. § 1983 damage actions as well. *Id.* at 105.

ERISA contains an exclusive federal jurisdiction provision that is also very broad. Section 502(e)(1) provides that:

> [T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary or fiduciary.

29 U.S.C. § 1132(e)(1). This grant of exclusive federal jurisdiction intersects with the TIA's bar of federal jurisdiction and creates the issue in this case.

The issue of whether the TIA bars challenges to state tax laws under ERISA in federal courts was expressly reserved by the Supreme Court in *Franchise Tax Board of California v. Construction Laborers Vacation Trust For Southern*

California, 463 U.S. 1, 20, n. 21, 103 S. Ct. 2841, 2852 n. 21, 77 L. Ed. 2d 420 (1983).

> We express no opinion, however, whether a party in CLVT's position could sue under ERISA to enjoin or to declare invalid a state tax levy, despite the Tax Injunction Act, 28 U.S.C. § 1341. See *California v. Grace Brethren Church*, 457 U.S. 393, [102 S. Ct. 2498, 73 L. Ed. 2d 93] (1982). To do so, it would have to show either that state law provided no "speedy and efficient remedy" or that Congress intended [section] 502 of ERISA to be an exception to the Tax Injunction Act.
>
> To decide this issue, which is squarely before us, we must first determine whether a "plain, speedy and efficient" remedy exists in the Michigan courts, and then, if necessary, determine whether Congress, in passing ERISA, intended to create an exception to the TIA.
>
> Whether a "plain, speedy and efficient" state remedy exists in this case depends on whether the Michigan courts have jurisdiction to decide plaintiffs' ERISA claims despite ERISA's grant of exclusive federal jurisdiction. If they do not, there is, of course, no state remedy. This Circuit has stated that the statutory grant of exclusive jurisdiction in a particular court strips other courts of their original jurisdiction in all cases covered by the statute. *Greater Detroit Resource Recovery Authority v. EPA*, 916 F.2d 317, 322 (6th Cir. 1990). Similarly, the D.C. Circuit has found it "well settled that . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (citations omitted). *See*

also Mississippi v. Louisiana,---- U. S. ----, 113 S. Ct. 549, 121 L. Ed. 2d 466 (1992) (28 U.S.C. § 1251(a), which gives "original and exclusive jurisdiction" over all controversies between the states to the Supreme Court, necessarily denies jurisdiction of such cases to any other federal court). Accordingly, we find that ERISA's express grant of exclusive jurisdiction to the federal courts divests state courts of jurisdiction to hear claims *brought under ERISA. Accord E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1102 (5th Cir.), *cert. denied*, --- U.S. ----, 112 S. Ct. 585, 116 L. Ed. 2d 610 (1991). *Cf. Shofer v. Hack Co.*, 970 F.2d 1316, 1319 (4th Cir. 1992) (where ERISA claims are within the exclusive jurisdiction of the federal courts, state courts are plainly without jurisdiction); *Pension Trust Fund for Operating Engineers v. Triple A Machine Shop*, 942 F.2d 1457, 1461 (9th Cir. 1991) (because of the exclusive jurisdiction of federal courts over ERISA § 502(a)(3) claims, state court had no jurisdiction to hear these claims). *But see Barnes v. E-Systems, Inc.*, ---- U.S. ----, 112 S. Ct. 1, 3, 115 L. Ed. 2d 1087 (1991) (Scalia, Circuit Justice)[2] ("That is not an inevitable implication, and perhaps not a likely one.").

The lower court recognized that federal courts have exclusive jurisdiction of all cases "brought under" ERISA. It concluded, however, that the instant case merely involved an ERISA issue. It concluded that "the state courts lack jurisdiction to determine ERISA preemption only when the plaintiffs' cause of action falls within the scope of

[2] Justice Scalia stayed the Fifth Circuit's judgment in *E-Systems, Inc. v. Pogue* that states were without jurisdiction, finding that *certiorari* and ultimate reversal were likely. However, the Supreme Court denied certiorari. ---- U.S. ----, 112 S. Ct. 585, 116 L. Ed. 2d 610 (1991).

section 502(a) of ERISA, that is, if the action is one by a participant, beneficiary, or fiduciary for relief under ERISA, to enjoin an act or practice violating ERISA, or to obtain other relief enumerated in section 502(a)." It further concluded that all of the plaintiffs' claims fall outside of section 502(a), relying upon *Franchise Tax Board, supra.* In *Franchise Tax Board,* the Supreme Court ordered a remand of an action to state court, even though the central issue in the case was ERISA preemption. 463 U.S. at 28, 103 S. Ct. at 2856. However, in *Franchise Tax Board,* the state had sued CLVT in state court seeking 1) to enforce levies against funds covered by ERISA, and 2) a declaration that such levies were valid in anticipation of the defendant's ERISA preemption defense. The defendants removed the case to federal district court under 28 U.S.C. § 1441. The Court held that under the well-pleaded complaint rule, the case was not removable despite the fact that the federal defense was the only question truly at issue, because the plaintiff's claims did not arise under federal law.

"A suit arises under the law that creates the cause of action." *Id.* at 8-9 (quoting *American Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257, 260, 36 S. Ct. 585, 60 L. Ed. 987, (1916)).

Section 502(a)(3) of ERISA, [29 U.S.C. § 1132(a)(3),] specifically grants trustees of ERISA-covered plans like CLVT a cause of action for injunctive relief when their rights and duties under ERISA are at issue, and that action is exclusively governed by federal law. . . .

The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties . . . as to whom Congress presumably

> determined that a right to enter federal court was necessary to further the statute's purposes. It did not go so far as to provide that any suit against such parties must also be brought in federal court when they themselves did not choose to sue.
>
> . . . .
>
> ERISA carefully enumerates the parties entitled to seek relief under [section] 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision.

Id. at 19-21, 27, 103 S. Ct. at 2851-52, 2855 (footnotes omitted) (emphasis in original). The Court twice warned that it was expressing no opinion as to the effect of the Tax Injunction Act. *Id.* at 20 n. 21, 27 n. 31, 103 S. Ct. 2851 n. 21, 2855 n. 31. However, the above passages tell us that a claim brought by a fiduciary under section 502(a)(3) is considered a claim brought under ERISA. Because the Franchise Tax Board was not an "enumerated party" under section 502(a), the Court held that the Board's claim for declaratory relief on the preemption issue did not arise under ERISA. Under these circumstances, the exclusive federal jurisdiction provision, 29 U.S.C. § 1132(e)(1), is inapplicable and state courts are free to decide the ERISA preemption issue.

Plaintiffs seek two kinds of relief, a refund for past taxes paid and injunctive or declaratory relief to prevent future collection. Plaintiffs' claim for a refund is created by state law, M.C.L.A. § 205.1 *et seq.* Even though entitlement to a refund will be dependent upon ERISA preemption, section 502(a) does not expressly create a refund cause of action. It is possible that section 502(a)(3)(B)(i), which creates a cause of action for obtaining "equitable relief" to redress ERISA violations, encompasses the refund of monies wrongfully collected. However, we do not decide the issue

of whether plaintiffs' claim for a state tax refund arises under ERISA because, as discussed below, the Eleventh Amendment bars all claims for monetary relief against defendants.

ERISA does, however, expressly create an injunctive remedy. Section 502(a)(3) provides in pertinent part:

> A civil action may be brought--
>
> . . . .
>
> By a . . . fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter, . . . or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter . . . .

29 U.S.C. § 1132(a)(3).[3] Section 502 (a)(3)(B) has been interpreted as creating a cause of action for a declaratory judgment. *Franchise Tax Board*, 463 U.S. at 27 n.31, 103 S. Ct. at 2855 n. 31 (citing *Cutaiar v. Marshall*, 590 F.2d 523, 527 (3d Cir. 1979)). We find that plaintiffs' claims for injunctive and declaratory relief against defendants are brought under ERISA. Therefore, under *Franchise Tax Board*, the exclusive federal jurisdiction provision of ERISA, 29 U.S.C. § 1132(e)(1), applies, and under these circumstances, the Michigan courts lack jurisdiction to decide these ERISA claims.

Because the Michigan courts lack the jurisdiction to decide the plaintiffs' injunctive and declaratory ERISA claims, the plaintiffs are without a "plain, speedy and efficient" remedy at state law. Thus, the District Court has jurisdiction over those challenges to Michigan's tax code under ERISA seeking injunctive and declaratory relief. Because we find that the "plain, speedy and efficient"

[3] Section 1144 preempts all state laws relating to employee benefit plans including state tax laws. 29 U.S.C. § 1144(a) and (b)(5)(B)(i).

exception to the TIA applies here, we find it unnecessary to decide whether Congress intended section 502 of ERISA to be an exception to the TIA.

B.

The Eleventh Amendment

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of a Foreign State.

U.S. Const. amend. XI. This immunity is far reaching. It bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100-01, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67 (1984), by citizens of another state, foreigners or its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842, (1890). The amendment also bars suits for monetary relief against state officials sued in their official capacity. However, the amendment does not preclude actions against state officials sued in their official capacity for prospective injunctive or declaratory relief. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714, (1908).

The Eleventh Amendment has no application under two circumstances: 1) where a state has itself waived its immunity from federal suit; and 2) where Congress has abrogated the states' immunity. The plaintiffs make no argument for waiver, but do argue that Congress intended to abrogate the states' immunity by passing ERISA.

Congress may override the states' Eleventh Amendment immunity when it acts pursuant to its powers under the Fourteenth Amendment, *Dellmuth v. Muth*, 491 U.S. 223, 227, 109 S. Ct. 2397, 2400, 105 L. Ed. 2d 181 (1989) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.

Ct. 2666, 49 L. Ed. 2d 614 (1976)), or pursuant to the Commerce Clause, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-19, 109 S. Ct. 2273, 2281-84, 105 L. Ed. 2d 1 (1989) (plurality opinion). The Supreme Court has set forth and adhered to a strict test for Congressional elimination of state sovereignty. This test requires unequivocal and textual support:

> Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L. Ed. 2d 171 (1985). While falling short of requiring Congress to explicitly annul state immunity by making reference to the Eleventh Amendment or state sovereign immunity, *see Dellmuth*, 491 U.S. at 233, 109 S. Ct. at 2402 (Scalia, J., concurring), the Court has consistently found no abrogation in the absence of the requisite clear statutory language the *Atascadero* test requires. See *Dellmuth*, 491 U.S. at 227-32, 109 S. Ct. at 2399-402 (the Education of the Handicapped Act ("EHA") does not abrogate state immunity); *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468, 475, 107 S. Ct. 2941, 2947, 97 L. Ed. 2d 389 (1987) (Congress did not express in "unmistakable statutory language" its intention to abrogate state immunity under the Jones Act); *Atascadero*, 473 U.S. at 242-46 105 S. Ct. at 3147-49 (statutory language of the Rehabilitation Act not sufficiently clear to abrogate state immunity).

In *Union Gas*, the Supreme Court held that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), abrogated the states' Eleventh Amendment immunity to be free from suits in federal court. The Court found in CERCLA's text the clear and unmistakable statutory language it found lacking in the EHA, the Jones Act and the Rehabilitation Act. What distinguishes CERCLA are its provisions expressly subjecting states to suit for

money damages under CERCLA.

Under CERCLA's liability scheme, persons who own or operate hazardous waste facilities or who transport or dispose of hazardous waste are liable for all costs of removal and remediation at the site. 42 U.S.C. § 9607(a). States are expressly included in the statute's definition of "persons" potentially liable under CERCLA. *Id.* § 9601(21). CERCLA also expressly provides that states are to be treated in exactly the same manner as non-governmental owner/operators, in all but one circumstance, including liability. *Id.* § 9601(20)(D). The Court found it "highly significant" that Congress used language almost identical to the language of the provision waiving federal immunity to CERCLA suits in the state liability section. Another section of the statute provides that states will not be liable where "actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person." It continues, "[t]his paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government." *Id.* § 9607(d)(2). The Court concluded that the limitations on the states' liability found in sections 9601(20)(D) and 9607(d)(2) presupposed that states were liable as a general rule. *Union Gas*, 491 U.S. at 8, 10, 109 S. Ct. 2277-78, 2279. Based on the above language, the Court held that "the language of CERCLA as amended by SARA clearly evinces an intent to hold States liable in damages in federal court." *Id.* at 13, 109 S. Ct. at 2280.

When compared to the statutory language interpreted by the *Union Gas* Court, the text of ERISA falls short of the clarity by which Congress expressed its intent to subject states to federal suits under CERCLA. In *Dellmuth, Welch,* and *Atascadero,* the only statutory support for abrogation was a general authorization for suits in federal court. The Court found that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Dellmuth,* 491 U.S. at 231, 109 S. Ct. at 2402 (quoting *Atascadero,* 473 U.S. at 246, 105 S. Ct. at 3149). In addition to granting federal jurisdiction, ERISA provides for *exclusive* federal jurisdiction

over all civil actions brought under ERISA. 29 U.S.C. § 1132(a). ERISA also preempts all state laws relating to employee benefit plans, *Id.* § 1144(a), including state tax laws. *Id.* § 1144(b)(5)(B)(i). Plaintiffs argue that when viewed together, these provisions require them to bring their preemption suit against the state in federal court. While no provision expressly excludes states as potential defendants, neither does any provision expressly include states or waive their traditionally held immunity from suits in federal court. In the absence of unmistakably clear language, we cannot hold that ERISA abrogates the Eleventh Amendment.

This conclusion does not render section 1144(b)(5)(B)(i), subjecting state tax laws to ERISA's pre-emption provision, meaningless. Application of the Eleventh Amendment has the following effects: 1) all claims against the Department of Treasury are barred; and 2) all claims against all parties for monetary relief are also barred. We hold that neither the Eleventh Amendment nor the TIA bars plaintiffs from suing defendant officials Roberts and Hoatlin in their official capacity for prospective declaratory and injunctive relief.

II.

Motion for Leave to File Second Amended Complaint

Plaintiffs sought to add a claim under 42 U.S.C. § 1983 for violation of the Commerce Clause. Where a response to a complaint has been filed, the plaintiff may amend the complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15 (a). The defendants did not consent to the amendment. The Supreme Court has set forth the general standard to be used under Rule 15 (a):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or

> dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962). This Circuit has addressed the issue of "futility" in the context of motions to amend, holding that where a proposed amendment would not survive a motion to dismiss, the court need not permit the amendment. *Neighborhood Development Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 23 (6th Cir. 1980).

The District Court found that it would be futile for plaintiffs to amend their complaint to add a claim under section 1983. Congress did not intend to abrogate the states' Eleventh Amendment immunity by passing section 1983. *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979). The Supreme Court has held that a state is not a "person" who can be sued as that term is used in section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989). These holdings apply also to claims against officials acting in their official capacities. *Id.* at 71, 109 S. Ct. at 2312.

The proposed claim for refund of taxes paid would not be able to withstand a motion to dismiss by the Department of Treasury since as part of the state it is immune under the Eleventh Amendment, and it is not a "person" within the meaning of section 1983. Nor would that proposed claim be able to withstand a motion to dismiss by the named officials. This Court has held that section 1983 plaintiffs must clearly set forth in their pleadings that they are suing the officials in their individual capacities for damages, not simply in their capacities as state officials. *Hardin v. Straub*, 954 F.2d 1193, 1199 (6th Cir. 1992); *Wells v. Brown*, 891 F.2d 591, 592 (6th Cir. 1989). Failure to clearly name the officials in their individual capacities mandates the conclusion that jurisdiction is lacking over any possible claims against the officials in their

individual capacities. *Id.* at 593-94. Moreover, since plaintiffs seek judgment for taxes unlawfully collected and retained by the treasury of the state, the proposed claim can only be against the officials in their official capacities. Further, since the amended claim was to be based on the Commerce Clause where there is no exclusive jurisdiction in the federal courts, plaintiffs would have a speedy and efficient remedy in state courts and the suit would be barred by the TIA. The District Court did not err in dismissing the motion to amend.

III.

For the reasons discussed above, the District Court's decision is AFFIRMED in part and REVERSED in part. We AFFIRM the dismissal of all claims for monetary damages against all of the defendants as well as all claims against the Department of Treasury. We also AFFIRM the court's denial of the plaintiffs' motion for leave to file a second amended complaint. We REVERSE the dismissal of the claims for injunctive and declaratory relief under ERISA against the defendant officials and REMAND the case to the District Court.

(4)

Supreme Court, U.S.
FILED
JUL 3 1996
CLERK

No. 95-1913
In the Supreme Court of the United States
October Term, 1995

THIOKOL CORPORATION, et al.,

Petitioners,

v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN; DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan; and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Daniel M. Greenberg
Michael R. Bell
Assistant Attorneys General
Attorneys for Respondents

July, 1996

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QUESTIONS PRESENTED

The Michigan Single Business Tax ("SBT"), Mich. Comp. Laws § 208.1 *et seq.* is a value-added tax using an addition method of calculating value added. It requires taxpayers doing business in Michigan to include in their tax base "compensation", including payments to employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Another Michigan statute, Mich. Comp. Laws § 205.27a(6), imposes a statute of limitations and requires taxpayers seeking refunds on the ground that the tax violates the federal constitution to file such claims within 90 days after the date set for filing a return.

Specifically the issues presented in this case are:

I. Whether ERISA § 514(a) pre-empts the Michigan SBT.

II. Whether ERISA § 514(a) pre-empts the statute of limitation in Mich. Comp. Laws § 205.27a(6).

III. Whether the federal courts have jurisdiction to consider a declaratory judgment seeking declaration that the statute of limitations in Mich. Comp. Laws §205.27a(6) violates the Due Process and Equal Protection Clauses of the United States Constitution.

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The amicus brief filed by the Committee on State Taxation was not available to the Respondents at the time the Brief in Opposition was being prepared, so pursuant to S. Ct. Rule 15.8 Respondents file this short supplemental brief to address the points raised by the amicus brief.

ARGUMENT

I.

MICHIGAN'S SINGLE BUSINESS TAX IS NOT PRE-EMPTED BY THE TESTS URGED ON THIS COURT BY AMICUS.

Amicus ask that a "line in the sand" be drawn regarding the pre-emption of all manner of state statutes. To this end Amicus has presented two tests which it contends will appropriately resolve future pre-emption cases. (Amicus p. 3).

The first test is the "magic word", specific reference, bright line test which would condemn all state statutes that merely refer to ERISA plans. The inadequacy of such a test has been addressed fully in Respondents' Brief in Opposition and by both the District Court and the Court of Appeals. It will not be further addressed here.

The second test seeks to evaluate the effect of a state law as follows:

> [I]f the effect of the state law in question is to exert downward pressure on the amount of the benefit fund that will be available for the provision of benefits, the law "relates to" such fund and must be preempted.

(Amicus p. 3).

This oblique statement does little to advance the analysis of what statutes should be subject to pre-emption. In this Court's most recent decision on this issue the Court stated that statutes resulting in indirect administrative costs

or having an economic influence on administrative decisions are not necessarily pre-empted. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___; 115 S. Ct. 1671; 131 L.Ed. 2d 695, 709 (1995). To this extent the Court has rejected an analysis that focuses solely on economic influences or downward pressure on the amount available for the provision of benefits.

In applying its "downward pressure" test, Amicus distinguishes taxes that are imposed on the assets or contributions to plans from those that are not. (Amicus p. 9). Under this analysis Amicus contends that the tax statutes at issue in *E-Systems, Inc. v. Pogue*, 929 F.2d 1100 (5th Cir. 1991); *In re Morgan Guaranty Trust Co. of New York v. Tax Appeals Tribunal*, 80 N.Y.2d 44; 599 N.E.2d 656 (N.Y. Ct. App. 1992); and *NYSA-ILA Medical and Clinical Services Fund v. Axelrod*, 74 F.3d 28 (2nd Cir. 1996), *on appeal to the U.S. S. Ct. sub nom, Debuono v. NYSA-ILA*, 64 U.S.L.W. 3806 (June 3, 1996), were appropriately pre-empted. Amicus goes on to state that Michigan's single business tax affects plans in the same way as the taxes at issue in the three cases above cited. (Amicus p. 9). This is simply not true.

In *E-Systems* the tax was imposed on what were denominated as "administrative or service fees". These "fees" included not only sums paid to service providers, but also claims and benefits paid by plans to beneficiaries. Further, the statute provided that if the service provider failed to make payment, liability attached to the plan. *E-Systems*, 929 F.2d at 1102. Evident in *E-Systems* was an impact on all ERISA relationships. *Id.* at 1103.

In *Morgan Guaranty Trust Co.*, the tax was a generally applicable tax statute that imposed a tax on gains derived from the transfer of real property within the state. The Court held the tax had "more than a tenuous, remote or peripheral connection to employee benefit plans." The Court stated:

> We reach that conclusion from analysis of the structural, administrative and economic impact of the tax on the Plan viewed against the backdrop of the terms and objectives of ERISA.

599 N.E.2d at 660.

The Court found that the statutes imposed record keeping and reporting requirements on the plan which would, therefore, impact directly on the plan. The Court also noted that the tax would impact the plan's investment strategy and that the tax is directly on the plan, thereby depleting assets already in the plan. 599 N.E.2d 660, 661.

In *NYSA-ILA* the Court of Appeals on remand underscored its finding of a direct and impermissible effect on qualified plans.

> The facts of the present case distinguish it from *Travelers*, because, unlike in *Travelers*, there is no third party between the plan and the tax imposed pursuant to the HFA. Rather, the statute at issue depletes the Fund's assets directly, and thus has an immediate impact on the operations of an ERISA plan. As we observed in our original opinion, the HFA imposes "an immediate tax on payments and contributions which were intended to pay for participants' medical benefits . . . [and] thus directly affects the Fund in its principal role as an employee welfare benefit plan."

Id. at 30 (citation omitted).

As fully discussed in the Brief in Opposition and by the lower courts in their opinions, the SBT does not tax contributions to plans, does not impact on the relationship between the ERISA entities, and does not impact ERISA plans in any manner that is more than "remote, tangential or peripheral." Accordingly, even if one accepts the validity of Amicus' analytical paradigm, its proper application to the

SBT results in a finding that the SBT is not subject to pre-emption.

II.

A GRANT OF CERTIORARI IN THIS CASE WILL NOT ESTABLISH THE "LINE IN THE SAND" AS SUGGESTED BY AMICUS.

Respondents, as officials responsible for the administration of state tax statutes, are sympathetic with Amicus' concern for, and desire for, clarity in defining the limits of ERISA pre-emption. At the same time Respondents acknowledge and respect the well-established judicial doctrine prohibiting advisory opinions and limiting the scope of decisions to the precise issues presented.

This Court's opinions on ERISA pre-emption establish an analytical framework giving due consideration to Congressional intent and appropriately focusing on the impact or effect of a particular state law on qualified plans. As recognized by this Court in *Trinova Corp. v. Michigan Dep't. of Treasury*, 498 U.S. 358; 111 S. Ct. 818; 112 L. Ed. 2d 884 (1991), the District Courts, and the Court of Appeals, the unique nature of the tax here at issue with its equivalent methods of calculation confirms that this is not a case amendable to yielding a rule applicable in other contexts.

RELIEF SOUGHT

Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Daniel M. Greenberg
Michael R. Bell
Assistant Attorneys General
Attorneys for Respondents

July, 1996
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Supreme Court, U.S.
FILED
JUL 25 1996
CLERK

No. 95-1913

In The

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THIOKOL CORPORATION, et al.,

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vs.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

PATRICK R. VAN TIFLIN (P26119)
MICHELE L. HALLORAN (P29973)
KIM D. CROOKS (P40485)
HOWARD & HOWARD ATTORNEYS, P.C.
The Phoenix Building, Suite 500
222 Washington Square, North
Lansing, Michigan 48933-1817
(517) 485-1483

Attorneys for Petitioners

July 24, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit which allows the State of Michigan to impose a state tax obligation on employers measured by reference to the amount of the employer's payments for health and life insurance acquired for its employees and contributions made to retirement plans established for the benefit of its employees which are subject to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") despite the ERISA preemption clause prohibition against the enactment of "any state tax law relating to employee benefit plans" covered by ERISA?

II. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit that a 90-day statute of limitations limiting the right of a Michigan taxpayer to contest a Michigan tax on the basis that the tax violates a federal statute such as ERISA or a constitutional provision, when a four-year statute of limitations applies to the right to contest the tax on any other basis, is not preempted by ERISA?

III. Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit that a federal court lacks jurisdiction to consider a declaratory judgment action requesting as relief a determination that a 90 day statute of limitations on the right of a Michigan taxpayer to contest a Michigan tax on the basis that the tax violates a federal statute such as ERISA or a constitutional provision, violates the due process and/or equal protection clauses of the United States Constitution, in light of 28 U.S.C. § 1341?

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REPLY BRIEF FOR PETITIONERS

Respondents have filed a Brief In Opposition to the Petition for Writ of Certiorari currently pending consideration by this Honorable Court and a supplemental brief for Respondents dated July, 1996 [sic]. Pursuant to S. Ct. Rule 15.6, Petitioners file this Reply Brief. The purposes for which this Reply Brief is submitted are as follows:

1. To correct and clarify Respondents' overly broad statement of the ERISA preemption issue involved in the pending Petition; and
2. To impeach the credibility of certain factual representations made by Respondents in their Brief In Opposition to this Court through reference back to Respondents' pleadings filed in the Federal District Courts below; and
3. To address the applicability of the decision of this Court in *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358; 112 L.Ed.2d 884; 111 S.Ct. 818 (1991) cited and argued throughout the Brief For Respondents In Opposition; and
4. To address the national significance of this case challenged by the Brief in Opposition.

ARGUMENT

I.

FAIR PRESENTATION OF THE QUESTION.

A comparison of the Statement Of Questions Presented from page i of the Petition for Writ of Certiorari and the Brief For Respondents In Opposition reveals that Respondents overstate both the preemption question presented by this case and the relief sought by Petitioners. The question is not, as stated by Respondent, "Whether ERISA § 514(a) pre-empts the Michigan SBT" since such a statement implies that Petitioners wish this Court on review to strike down the entirety of the SBT. That is not the truth. The truth is that the question presented and the relief sought by Petitioners is a determination that a portion of one subsection [Mich. Comp. Laws Ann. § 208.4(3)] of the Single Business Tax

Act ("SBTA") is preempted by § 514(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a). *See*, Petition, pp. 2-6 and fn 8. An affirmance by this Court of the *Akzo* District Court decision in favor of Petitioners below will result in a finding of preemption of only one portion of one subsection of one section of the SBTA and not the entirety of the state statute.

II.

RESPONDENTS' REVERSAL OF FIELD.

At page 18 of its Brief In Opposition, Respondents contradict their pleadings filed in the *Akzo* District Court proceeding below by asserting " . . . the fact that there is no direct correlation between contributions to employee benefit plans and SBT liability. To the extent that sums are retained as profit or otherwise consumed in the economic endeavor of the taxpayer, the tax liability may not be impacted at all by a decision to lower contributions to a qualified plan." In the complaint filed in the District Court below in *Akzo, et al.*, Petitioners alleged at ¶ 26 as follows:

> 26. Application of the SBTA so as to require each plaintiff to include in its single business tax base its contributions to and the costs which it incurs in sponsoring and providing employee benefit plans has and will have the effect of increasing each plaintiff's single business tax liability.

Here is what Respondents said then:

> 26. **Defendants admit the allegations set forth at ¶ 26 of the Complaint**. By way of further answer, Defendants state that Michigan's single business tax liability is based upon the addition method of determining value-added. This method arrives at a tax base by adding various components, including a sub-component – compensation. Under the subtraction method of determining value-added, there is no sub-component – compensation. The addition and subtraction methods are conceptually equivalent methods of calculating value-added. *Trinova v. Department of Treasury*, 498 U.S. ___; 111 S. Ct 818; 112 L.Ed.2d 884 (1991). **While it is true that including contributions and costs of**

> **employee benefit plans increases the single business tax payable, this is an irrelevant inquiry.** To exclude these costs and contributions reduces the tax inappropriately in that it excludes an element of tax base which is an essential component of a value-added tax. [Bold highlighting added]

This candid answer filed by Respondents below in July of 1993 states the obvious, and Petitioners would not repeat it but for Respondents' failure to own up to this portion of its District Court pleading in the brief filed by Respondents before this Honorable Court.

This contradiction of Respondent by Respondent is also unsupported by any evidence in the records assembled below, and is in fact contrary to the evidence assembled. On November 12, 1993, the parties took the deposition of John C. Hedley, Vice President of Human Resources for Petitioner Morton International. He testified concerning the SBTA impact on decisions Morton makes with regard to providing employee benefits to their employees throughout the nation. Asked to explain the relationship of the SBTA burden and the level of benefits which Morton determines to provide to its employees, Mr. Hedley testified:

> A . . . [T]his [SBT liability] is a very definite cost and – any cost is important to us in determining what we're going to do with our benefit plans currently and in the future. [App. 86]
>
> A And, therefore, to the extent that costs go up or are higher and we want to control those costs, we can change the level of benefits one way or the other. [App. 88]

Asked to explain actions which Morton has taken in response to an increase in costs of its labor contract, including employee benefit levels, Mr. Hedley elaborated:

> A It could have a variety of impacts. I mean, that happens to be a salt plant, of which we have a great number in the United States. The benefit levels at that particular plant over a 25-year period of time or a 30-year period of time that I've been involved with it have been higher than some of the other plants. As a consequence, the marketing area that is served by that particular plant has steadily

shrunk . . . and those benefit costs are just one of the factors of the hired labor costs in that particular plant. [App. 89]

As to the connection between the cost of providing employee benefits and state taxation imposed with reference to the funding employer payments, Mr. Hedley said:

A . . . and that's why controlling the costs of those plans becomes very, very important to us because every time we find ourselves in the position of having to control these costs by making a reduction in the benefit, we think that we denigrate the attractiveness of employment with the company . . . all in effort to save a little bit of money in terms of the administrative costs of the plan so that we could maximize the actual benefits to the employee rather than the administrative costs, and, I cannot help but say, such as taxes. [App. 95]

Mr. Hedley testified concerning the tangible impact the SBTA has upon employee benefits Morton provides to its employees nationwide:

A . . . one of the things that's particularly bothersome is that, as I understand the calculation of this tax cost, it can disproportionately affect us as a multistate employer with employees throughout the United States based upon the amount of business that we do in Michigan, where we don't – where have a disproportionately lower number of employees as opposed to where we might have them in other parts of the country.

Q (By Assistant Attorney General Greenberg) So the single business tax, as you perceive it, appears to be a little disproportionate in its ultimate numerical impact?

A Yes. I have currently 3,500 going on 4,000 employees in Utah, which is one-third of our employees. We don't do one-third of our business in Utah. And we do a smaller amount of our business in proportion in Utah and we do a greater proportion of our business in Michigan because of the population in Michigan, obviously, that our proportionate number of employees in Michigan. Therefore, the inclusion of a tax on our employee benefit

> costs in Michigan I think has a disproportionate effect on what we can do for benefits for our employees in Utah. [App. 104]

The correlation is admitted by Respondents and established in the record.

After thus contradicting its District Court pleadings, Respondent proceeds at page 18 to seek refuge in the decision of this Court in *Trinova Corp. v. Michigan Dep't of Treasury*, 398 U.S. 358; 111 L. Ed.2d 884, 905; 111 S.Ct. 818 (1991), particularly the discussion appearing at 498 U.S. 376. In that portion of its opinion, this Court said that the payment of additional compensation may or may not result in an increase in value-added. That statement does not serve to disprove the truth of Respondents' assertion below that including contributions to employee benefit plans in the SBT base increases SBT liability. Value-added may or may not increase as a result of the payment of additional employee benefits. However, there is no doubt that single business tax liability will increase as Respondent readily admitted before the District Court. Value-added is not the same as single business tax liability. SBT liability, because it is determined by adding income and expenses, including employee benefit plan contributions, increases when plan contributions increase, even though, as this Court observed in *Trinova*, value added may not increase.

Another contradiction to Respondents' position taken in its pleadings filed in the District Court below appears at page 19 of Respondents' Brief In Opposition. Respondents maintain "There is no 'reversal' of federal tax deductions for plan contributions as suggested by Petitioners. (Petition, p 2.)" At paragraph 30.b of Plaintiffs' Motion for Summary Judgment in *Thiokol* below, Petitioners alleged as follows:

> 30. The SBTA "relates to" employee benefit plans within the meaning of the preemption clause of 29 U.S.C. §§ 1144(a) and 1144(b)(5)(B)(i) for reasons that include the following: . . . (b) In calculating the tax base of a single business taxpayer, it is necessary to refer to expenses incurred, insurance premiums paid, and contributions made by each plaintiff as an employer to its employee benefit plans;

Here is what Respondents said then:

> 30.b In response to the allegations set forth in paragraph 30(b) of Plaintiffs' Motion for Summary Judgment, Defendants admit that the statutorily-prescribed calculation of the SBT base requires inclusion of contributions by Plaintiffs to their employee benefit plans. Defendants deny that this fact compels a determination that the SBT "relates to" employee benefit plans. **The purpose of this inclusion is to eliminate the deduction for contributions to employee benefit plans allowed by the Internal Revenue Code in calculating the federal corporate income tax because such a deduction is inconsistent with the determination of value-added.** The tax base is capable of being calculated by two equivalent methods, i.e., the additive or subtractive method. *Trinova*, 365, 376. Michigan's choice of the additive method does not result in the SBT "relating to" employee benefit plans. [Bold highlighting added]

The SBTA provides for state tax treatment directly the opposite of that provided under the Internal Revenue Code. Contributions to employee benefit plans are specifically excluded in calculating federal income subject to tax. Contributions to employee benefit plans are specifically included in calculating single business tax base subject to tax. The SBTA works at cross-purposes with the Internal Revenue Code, eliminating the deduction allowed for contributions to employee benefit plans in calculating the federal corporate income tax. The SBTA is apparent in its reversal of the federal income tax deduction, both by the language of § 4(3) of the SBTA, but also graphically demonstrated by the mandatory entries on lines 13 and 14 of the Single Business Tax Annual Return Form C8000 (Petitioners' App. 79).

When a case reaches the Supreme Court of the United States, it is simply too late for one party to attempt to change the facts. Litigants simply must not be allowed to adopt new positions contrary to those which they have taken in preceding stages of the same legal proceeding, and when such abandonment is apparent, it must be challenged.

III.

TRINOVA DOES NOT CONTROL THIS CASE.

In their Brief In Opposition, Respondents merely repeat much of the discussion of value-added tax ("VAT") economic theory from the *Trinova Corp. v. Mi 'igan Dep't of Treasury*, 498 U.S. 358; 112 L. Ed.2d 884; 111 S.Ct. 818 (1991) opinion as though it has dispositive application to the present case. There, the Court was faced with two questions: 1) whether the three-factor apportionment formula for the SBTA violated either the due process or commerce clauses of the U.S. Constitution, and 2) whether the SBTA discriminated against out-of-state businesses. *Trinova*, 112 L. Ed.2d at 896. By contrast, the case on petition has nothing to do with apportionment, due process, commerce clause or discrimination. Rather, the question presented here is whether a federal enactment, universally held to be the broadest ever enacted, preempts Michigan's attempt to determine tax responsibility by reference to funding contributions made by a sponsoring employer to benefit plans covered by ERISA.

In *Trinova*, the Court summarized Trinova's argument to be that because its SBT base was composed in large part of compensation and depreciation, elements which can be assigned to a geographic source, the Court *must* reject apportionment of the tax base altogether. 112 L. Ed.2d at 904. Apportionment is the process of dividing the tax base of a multistate taxpayer between several states in which it does business in order to attribute the tax base fairly among those states. Trinova argued that apportionment of a VAT base was unconstitutional. In response, Michigan argued that the SBT is a VAT, imposed upon business activity and the tax base, once amalgamated, was indivisible and its components could not be separately examined. This Court dismissed such a narrow analysis as follows:

> We reject at the outset, however, arguments by Michigan and some *amici curiae* that the Michigan SBT can be analyzed as a tax on 'business activity' [citation omitted]. The statute does not say that the SBT is a tax upon business activity, but rather that it is a 'tax of 2.35% upon the adjusted base of every person with business activity in this state which is allocated or apportioned to this state.' MCL 208.31(1) (1979)

> (emphasis added). While Michigan business activity is a threshold requirement for the tax, and value added is its measure, **labeling the single business tax a tax 'on business activity' does not permit us to forego examination of the actual tax base and apportionment provisions. 'A tax on sleeping measured by the number of shoes you have in your closet is a tax on shoes.'** Jenkins, State Taxation in Interstate Commerce, 27 Tenn L R 239, 242 (1960). 112 L.Ed.2d at 905 [Bold highlighting added]

The Court concluded that the mere fact that some tax base components could be geographically sourced did not constitutionally require Michigan to allow a taxpayer to geographically source (allocate) those items rather than include them in tax base subject to apportionment. 112 L. Ed.2d at 908. Most significantly, the holding in *Trinova* was that Trinova failed to meet its burden of proving by clear and cogent evidence that apportionment yielded a distorted result (*Id.* at 911) and that, as applied to Trinova during the tax year in issue, the SBT did not violate the due process or commerce clauses of the U.S. Constitution (*Id.* at 913).

However, the decision of this Court in *Trinova* does not authorize Michigan to enact a tax law which imposes liability by reference to contributions which a sponsoring employer makes to employee benefit plans. While there has been mostly congressional silence as to state taxing power, Congress has clearly spoken with regard to the ability of the states to legislate in relation to employee benefit plans covered by ERISA. It has expressed an intent to completely occupy the field, prohibiting states from enacting laws which make reference to a covered employee benefit plan or to establish rights or responsibilities under state law by reference to an ERISA plan. ERISA calls for preemption when a state law has a reference to or connection with a plan, including state tax laws. *Trinova* merely represents a recent application of the well-established commerce clause principle that a taxpayer bears a heavy burden in attacking a state tax apportionment scheme.

The case on Petition deals with Michigan's decision to legislate in its tax a specific reference to ERISA-covered plans, an area which Congress has told states to avoid. The bar in this area is explicit. 29 U.S.C. § 1144(b)(5)(B)(i) provides that ERISA preemption includes "any state tax law." The *Trinova* endorsement of

apportionment of the SBT base in the absence of contrary federal legislation is quite a different matter from state tax legislation which imposes tax liability by reference to contributions of covered employee benefit plans in the face of contrary federal legislation.

Despite all of Respondents' legal argumentation over the meaning of the *Trinova* case, there is only one argument upon which Respondents rely. SBT liability is admittedly determined by reference to employee benefit plan contributions. However, Respondents contend, they could have enacted a *different* tax in place of the SBT which did not contain a specific reference to employee benefit plan contributions (*i.e.*, a law of general applicability which would have no connection with covered employee benefit plans) which would have raised the same revenue, and therefore, the fact that Michigan has enacted a tax determined by reference to employee benefit plan contributions should not matter. However, the Court cannot and should not be consumed with rendering advisory opinions on hypothetical factual scenarios. It is called upon to decide the actual case and controversy presented, and what should have been and could have been are irrelevant to these proceedings. We join with Respondents, who at p. 4 of their Supplemental Brief, "acknowledge and respect the well-established judicial doctrine prohibiting advisory opinions and limiting the scope of decisions to the precise issues presented".

IV.

THE SIGNIFICANCE OF A SUPREME COURT DECISION IN THIS CASE.

Respondents' Brief In Opposition also seeks to downplay the national significance of the preemption issue involved in this case (Brief In Opposition, p 23) for the reason that Michigan is the only state in the nation which imposes a value-added tax. However, the national significance of this case goes well beyond a value-added tax since the decision of the Sixth Circuit below offers an endorsement of validity to any state or municipal revenue raising mechanism which measures tax liability in whole or in part by reference to employee benefit plan contributions. Under the analysis of the Sixth Circuit below, such an excise or privilege tax is valid so long as it is not specifically designed to effect the employee benefit plan

to which the contributions are made. The decision below thus goes well beyond the endorsement of the SBTA measurement of tax liability by reference to employee benefit plan contributions.

Secondly, even if the significance of the Sixth Circuit decision below is limited to the parties to this case, it is important to observe that the parties in *Thiokol* and *Akzo* are incorporated in ten different states of the nation and are headquartered in eleven different states of the nation. The Michigan SBTA is imposed by a heavily populated industrial midwestern state which does not exist in a vacuum. Indeed, its tax system has nationwide impact as its industries (automotive, chemicals, agriculture, consumer products) are deeply embedded in the national commerce.

Finally, Petitioners note that ERISA is a national labor law, and any decision concerning its scope and meaning has nationwide application and implications. The interstate commerce impact of the decision below is sharply focused by the testimony of Petitioner Morton's witness John C. Hedley that the Michigan tax has an effect on Morton's employees in Utah. See pp. 4-5, infra.

CONCLUSION

For all the reasons stated, Petitioners pray that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted:

HOWARD & HOWARD ATTORNEYS, P.C.
PATRICK R. VAN TIFLIN
Counsel of Record
MICHELE L. HALLORAN
KIM D. CROOKS
The Phoenix Building, Suite 500
222 Washington Square, North
Lansing, Michigan 48933-1817
Telephone: (517) 485-1483